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STANDARDIZED CONTRACTS IN A BI-JURAL STATE: THE
UNITED REPUBLIC OF CAMEROON

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Thesis submitted in fulfilment of the requirements for
the degree of Doctor of Philosophy, University of
Warwick, Law School.

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Abstract:

Within the past decade, there has been considerable debate amongst lawyers in most European and North American jurisdictions on standardized contracts. The realisation that these contracts did not fit into the framework of the law of contract elaborated by nineteenth-century theorists, induced judges and academic alike to fashion concepts and mechanisms in order to tackle the undoubted injustices which were concomitant with the use of standardized contracts. These well meaning attempts, while affording some protection to weaker contracting parties, were nevertheless productive of uncertainty and inconsistency. Hence, there has been in recent years a spate of legislation designed to deal with standardized contracts directly or indirectly.

The adoption of modern economic institutions and also of Western legal systems in Cameroon has brought about significant problems in the realm of contract. The widespread illiteracy in Cameroon, the lack of commercial sophistication of the bulk of the populace, and the use of standardized contracts, have created problems of a much wider dimension than those to be found in the developed countries.

This thesis involves a study in comparative law. It charts the ways in which the English and French courts have addressed the problems of standardized contracts. It also delves into how the Cameroonian courts have dealt with them, revealing the incongruities inherent in the application of concepts which have been evolved in a different country with distinct motives, in another country with entirely different social realities.

Finally, this thesis looks at the legislative innovations brought to this area of the law by four European countries and discerns what lessons can be learned from them by Cameroonian legislators in dealing with the problems of standardized contracts in Cameroon.

All this is achieved by pulling together legal analysis and comments by Anglo-Americans and European scholars, and by weaving into the text nearly all important English, French, Cameroonian and indeed American cases on this subject.

INTRODUCTION.

The law of contract in both England and France, and indeed in most of the Western capitalist countries, was essentially shaped in the nineteenth century. The premises of the law of contract were the laissez-faire theories of Adam Smith and others, and its mainstay was the principle of freedom of contract and the corollary, the sanctity of contract. Each contracting party was deemed to be acting through his free-will and the function of the law of contract was predominantly to define the necessary formal conditions for the validity of a contract. Once those conditions were obtained, the contracts had to be respected by both parties and by the courts as well.

The beginning of the twentieth century saw radical transformations of social and economic realities, inasmuch as the growth of large scale production, with the attendant growth of monopolies and the use of standardized contracts, began creating a fundamental disequilibrium or even an antagonism between the large powerful businesses on the one hand, and smaller businesses and consumers on the other. The cornerstone of the classical paradigm of contract law, i.e. freedom of contract, proved illusory because the faculty to negotiate contractual terms was no longer realizable. In the face of these changes, the mechanisms for the protection of weaker parties which were incorporated in the classical law of contract such as duress, misrepresentation and undue influence, could only afford formal protection.

This classical paradigm of contract, with all its appurtenances was transplanted into Cameroon, via colonialism. Because of local factors,

greater distortions have become apparent in this classical model of contract. While English and French courts and legislatures devised means of mitigating the unfairness of standardized contracts, their Cameroonian counterparts have not followed suit.

By introducing sweeping legislation in this area of the law, the English and French jurisdictions have tacitly acknowledged that judicial control of standardized contracts is insufficient. It will be submitted that this must *a fortiori* be the case in Cameroon.

This thesis is divided into seven chapters. The first four chapters culminate in an exposition of the current approach of the Cameroonian courts to the issues raised by standardized contracts. That exposition is reached by way of a description of the legal and economic context in Cameroon (Chapter One); a history of the evolution of the classical law of contract (Chapter Two); and an analysis of the law and the approach of the courts of France and England to standardized contracts (Chapter Three). Because the law of contract in Cameroon is based upon the law of these countries, these chapters provide the material for the eventual understanding of the current Cameroonian approach.

The study then considers the nature and value of the concept of "Unconscionability" in dealing with standardized contracts (Chapter Five) and the modern legislative attempts of four countries, viz, England, France, Germany and Sweden - to deal with the issues, before finally focussing upon a proposed strategy for Cameroon, drawing upon the experiences of the countries already mentioned, and where applicable, those of the African countries (Chapter Seven).

CHAPTER ONE:

THE SOCIO-ECONOMIC AND LEGAL STRUCTURE OF CAMEROON

It would be both ridiculous, and futile to attempt to carry out an elaborate study of the socio-economic and legal structure of Cameroon in a thesis of this kind. However, an outline of that structure is certainly not out of place here for it provides an overview of the context within which contracts are made and disputes arising therefrom are settled. Without such an overview, it will be difficult if not impossible to appreciate the extent of the problems to be raised subsequently and the conclusions reached by the researcher.

Section I: Cameroon's Legal System:

A: Historical Background.

There are three facts which will inevitably meet the eye of any legal scholar in Cameroon. The first which is obviously very trite, is that, like all African countries, the legal system is based on European models. The second is that Cameroon has inherited from its colonial past a highly complex legal system, consisting of at least three bodies of laws:- French law, English law, and Customary law (including Islamic law).⁽¹⁾ It therefore offers the fascinating example of a country attempting to create a legal system not only from the Civil and Customary law, but from the Common law as well. The third conclusion which is equally conspicuous is the appalling lack of awareness on the part of the community at large of

1. The terms "English" and "French" law are used here in a rather restrictive sense to denote that part of English and French law which through colonialism were extended to Cameroon.

the workings of the legal system, especially with respect to civil matters.

Cameroon, which occupies an area of about one hundred and eighty three square miles, with a population of about eight million, has a legal system which has been squarely determined by its colonial past. It is therefore impossible to understand it without some knowledge of that past. In 1884, after a period of intense rivalry between the British and the Germans, Germany outwitted Britain and annexed Cameroon.⁽²⁾ Their goal in doing so was to exploit intensively the territory's natural resources in order to feed the emerging industries in Germany.⁽³⁾ Thus, it did not take long for their influence on the territory to disappear after their rule was brought to an end during the First World War by the combined forces of Britain and France.

On the 4th of March 1916, Britain and France formally partitioned Cameroon after a series of diplomatic agreements. Under the Treaty of Versailles in 1919, Germany renounced all rights to its former colonies in favour of the allied and associated powers. Britain and France then presented the League of Nations with a 'fait accompli'. However, by the Acts of July 20th of the League of Nations, they undertook to administer the territory within the spirit of Art.22 of the League of Nations Covenant. Article 9 of the Acts of 1922 granted Britain and France "full powers of administration and legislation" over the Cameroons, and went further to provide that they were to be "administered according to the legislation of the Mandatory power as an integral part of its territory". It further

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2. Ardner, Eye-Witnesses to the Annexation of Cameroon. (Buea, Government Press, 1968) pp. 19-20.
 3. E. Lewin, The Germans and Africa. (Cassel & Co. Ltd., 1915)

stipulated that "The Mandatory Power is consequently authorised to apply to the regions subject to mandate its legislation with such modifications as are required by local conditions".

With these powers given her, France immediately took steps to extend her municipal law to what then became known as French Cameroons. She did this by the employment of reception statutes. The decree of May 22nd 1924 "rendered executory in the territory of the Cameroons placed under the Mandate of France the laws and decrees in French Equatorial Africa prior to January 1st 1924" Britain, on her part, proceeded to administer her own part of the territory - British Cameroons - as part of its adjacent colony of Nigeria. By an Order-in-Council No. 1621 of June 1923, laws in force in Nigeria were extended to British Cameroons.

At the end of the Second World War, the status of the Cameroons was changed from a mandatory territory under the League of Nations, to a Trust Territory under the United Nations. This development however, had no impact on the legal development of the territory since like the League of Nations before it, the United Nations gave Britain and France "full powers of legislation".⁽⁴⁾ Hence, English and French law came to exist in Cameroon for no other reason than this: their imposition by the colonial powers.

Although foreign law became imposed on the territory, there were certain areas where it was absolutely necessary to maintain customary law. Family law and the law of succession obviously stand out in this respect. British colonial policy, the cornerstones of which were indirect rule and trade, had to accommodate customary law as a matter of strategy. Furthermore, there is some weight for the proposition that customary law had to be

4. Cameroons (1946) United Nations Document A/155/Rev. 2 art 64.

maintained in order to "keep the natives native".⁽⁵⁾ As far as France is concerned, it has time after time been stated that her policy was one of assimilation. This would imply that she wanted to do away with customary law and its institutions. It is now evident however that this policy was simply aimed at setting apart an elite group among the indigenous people who would serve as her allies so to speak. They were given the status of "citoyen" when they abandoned their customary law and adopted the personal law of the civil code. The extension of French Law to the entire population, giving them civil and political rights was not only of no interest to the French, but was indeed inimical to their designs. France also, thus, maintained indigenous African institutions and law. The system they established to this effect was the "indigénat" which regulated the civil rights and obligations of the "sujets". There was therefore qualified recognition and enforcement of customary law in the entire territory.

B: Cameroon's Legal System Since Independence.

(i) Before 1972:

A chapter the scope of which is merely to give an insight into the legal system in Cameroon can hardly be the place to delve into its legal history. The emerging colonial system outlined above became consolidated in the British Cameroons in 1954. Because of constitutional changes in Nigeria and the Cameroons, the Nigerian (Constitution) Order-in-Council 1954 reorganising the court system was issued. Southern Cameroons (the new name given to Cameroon under British rule), had its own High Court and Magistrate Courts by virtue of the Southern Cameroons High Court Law, 1955 and the Magistrate Courts (Southern Cameroons) Law. Customary law

5. Gaertz, The Religion of Java (New York, 1960), p. 363.

Courts, then known as Native Authority Courts, were maintained. Appellate jurisdiction rested with the Federal Court of Justice in Lagos. Cameroonian law was thus tied to Nigerian Law.

Meanwhile, in the French Cameroons, the Judicial Organisation Ordinance No. 59/86 of 17th December 1959 created an array of courts. Five courts with original jurisdiction were instituted: The First Instance Tribunal, the "Justice de Paix" Tribunal; Customary Tribunal and Grade I Tribunal, both of which were traditional law courts; Divisional Criminal Courts and Special Criminal Tribunals. There was also an Appeal Court.

On the 1st of January 1960, the Trust Territory of French Cameroons attained independence and became "La République du Cameroun." On October 1st 1961, following a plebiscite, the then Southern Cameroons decided to unite with the new "République du Cameroun" and the Federal Republic of Cameroon was thus formed. With respect to legal matters, the legislation in force in each of the Federated States prior to the 1st of October 1961 was maintained insofar as it was not against the 1961 Constitution.⁽⁶⁾ But for the creation of a few new Federal Courts, which were courts of special jurisdiction, dealing essentially with constitutional and labour matters, the two distinct legal systems remained as they were in pre-independence days. The new courts instituted were: the Federal Court of Justice which dealt with constitutional issues and matters arising from conflicts of jurisdiction between the courts of East and West Cameroon as the French and British Cameroons became henceforth known respectively; the Federal High Court of Justice was to try the President and Ministers of State for treason - a task which it was never

6. Law No. 81-24 of 1st September 1961, article 46 in Journal Officiel de la République du Cameroun, September 30th 1961.

once called to undertake throughout its life. Labour Courts were also established throughout the Federal Republic.⁽⁷⁾ Each Federated State maintained a separate appellate system:- The Cour Suprême in East Cameroon and the West Cameroon Court of Appeal in West Cameroon. The decision of any court in either Federated State was however enforceable throughout the Republic.

This state of affairs continued until 1972. On the 20th of May 1972, the Cameroonian people, by a referendum, accepted President Ahidjo's proposal to transform the federal system into a unitary one. The country henceforth became the United Republic of Cameroon, composed of seven provinces, two of which are anglophonic, i.e. the former West Cameroon. A legal revolution thus took place and the new constitution which came in force on the 2nd of June 1972 provided for the establishment of a single system of courts within the whole country

(ii) Post 1972:

Article 42 of the 1972 Constitution gave the President of the United Republic of Cameroon powers to set up new judicial institutions within a limited period of one year. He did this by Ordinance No. 72/4 of 26th August 1972 on Judicial Organisation. The underlying reasons for the new decree were twofold: first of all, the passage from a Federated to a United Republic meant that a uniform system had to be set up. Secondly, the pre-1972 system was very complicated and inconvenient. The new Ordinance did away with the maze of courts which existed in the country and established a much simpler system of courts. Four courts with ordinary

7. M. Riou - "L'Organisation Judiciaire du Cameroun." Penant, vol. 79 No. 723, 1969, pages 33-86.

jurisdiction were created: Courts of First Instance, High Courts, Courts of Appeal and Military Courts. Three Courts with special jurisdictions were also instituted: The Supreme Court, the Court of Impeachment and the Higher Justicial Council.

Customary jurisdiction exists only "for the time being".⁽⁸⁾ The new justicial organisation aims at the eventual abolition of customary courts. These courts however continue to exist. In the Anglophonic provinces of the country, they are simply called Customary Courts while in the Francophonic provinces they are called "Justices de Paix".

First Instance⁽⁹⁾ Courts have replaced the Magistrate Courts in the Anglophonic Provinces. They consist of a President, one or more (professional) judges, a State Counsel with one or more deputies, a Chief Registrar with one or more registrars. Only one judge sits at a time. The Ordinance stipulated that there be one court of First Instance in every district in the country. This objective is far from being achieved however because of the lack of personnel and finance. Hence, one Court of First Instance may serve two or more district. Their substantive jurisdiction covers both criminal and civil matters. In criminal matters, they have jurisdiction over misdemeanours and simple offences,⁽¹⁰⁾ while in civil matters, they can try any action where the amount of the claim does not exceed 500,000 frs C.F.A., i.e. about £1,000.

8. S.26 of Ordinance No. 72/4 of 26th August 1972.

9. This nomenclature appears confusing as High Courts are also first instance courts. Even the Supreme Court in Cameroon is a first instance court, i.e. with respect to administrative matters.

10. The Cameroon Penal Code classifies offences according to the maximum punishment attributed to that offence. Thus, a misdemeanour is any offence the maximum punishment of which is 5 years imprisonment.

High Courts are composed of a President, who must be a judicial officer and member of the Court of Appeal, one or more judges, also members of the Court of Appeal, a Chief Registrar and one or more registrars, a State Counsel and one or more deputies. Like the First Instance Courts, they sit with only one judge, except in labour matters where there must be two assessors. They also have jurisdiction over proceedings affecting a person's status - divorce, affiliation, adoption etc. They can also issue prerogative orders such as 'certiorari', 'mandamus' and 'prohibition' and the 'writ of habeas corpus'. The ordinance of 1972 provided for the establishment of one High Court in every division of the country. Here again, it is the same old tale - lack of qualified personnel and sufficient funds do not permit this.

There is one Court of Appeal for each of the Provinces. They are composed of a President, one or more Vice-Presidents, one or more judges, a Procureur General, an Advocate General, legal assistants, a Chief Registrar and one or more registrars. Appeals come from Customary Courts, First Instance Courts, and the High Courts within any given Province and are tried by three judges.

The Supreme Court is an appellate court with special jurisdiction. There is one for the entire country and its seat is in Yaounde, the capital. It functions like the "Cour de Cassation" in France. It hears applications alleging an error of law in a judgement of the court below, i.e. the Court of Appeal, and decides only on questions of law, not of fact. Its primary role is to harmonize the interpretation of the rules of law by

the lower courts.⁽¹¹⁾ Decisions from any of the seven Courts of Appeal can be attacked by "pourvoi" to the Supreme Court.

The Supreme Court has unfortunately, however, had only a slight impact on the harmonization of the interpretation of the rules of law. This failure is due mainly to the fact that there is no real basis from which such harmonization can properly be done. The judges of the Supreme Court have been brought up in contrasting legal traditions. Thus, it is no surprise that the Supreme Court has ended up entrusting the hearing of appeals (pourvoi) from the Courts of Appeal in the Anglophonic provinces only to Anglophonic judges and vice-versa.

If the Supreme Court, which sits with five judges, finds that a Court of Appeal has made an error of law, it nullifies the judgement and remits the case to a differently constituted Court of Appeal (or that of another province). If however any particular matter comes to the Supreme Court for a second time, the Supreme Court may then give a final judgement.

The Supreme Court is also, oddly, a court of first instance with respect to administrative matters. Its administrative bench tries all administrative and constitutional matters. Appeals from the administrative bench may be brought to the full court.

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11. This was thought to be necessary because the principle of the binding force of precedent does not exist generally. It is to be found in a limited way in the Anglophonic Courts. Unlike other common law jurisdictions the Anglophonic Courts do not apply the principle rigidly for two reasons: (1) The absence of law reporting makes it unsafe to rely on precedent; (2) There are two Courts of Appeal in the Anglophonic Provinces and their decisions may not always be the same on any given point of law.

Although there is no rule as to the binding force of precedent in the Francophonic Courts, it must be observed however that in line with the French tradition, in practice if not in theory, a settled line of decisions - "jurisprudence constante" - constitutes strong authority and is generally followed. This is particularly so in administrative law where because of the absence of a code, case law is an actual source of law. "Les grands arrêts" are frequently cited as authority for propositions.

(iii) Content of the Law Administered:

In Criminal and Labour matters, the laws applicable are uniform in all the seven provinces. Here, the Legislature has made great strides in enacting local legislation. On October 1st 1966, Law No. 65-LF-24 of 12th November 1965 came into force, delineating the fundamental rules governing the whole of criminal law. On October 1st 1967, Law No. 67 - 1 of June 12th 1967, defining particular offences also came into effect. The two laws make up the Cameroon Penal Code. In 1967, the Cameroon Labour Code was also enacted.

In civil matters, excepting certain aspects of family law, viz., status, and some areas of commercial law such as banking and insurance, there is a dearth of local legislation.⁽¹²⁾ In the Anglophonic provinces, the applicable law comprises:- (a) the common law; (b) the doctrines of equity and (c) the statutes of general application which were in force in England before January 1st 1900.⁽¹³⁾ Laws which were enacted after 1900 and before independence under the colonial administration are also still applicable in so far as they do not go contrary to any new legislation. Pre-independence legislation, which as has already been remarked, was tied to Nigerian legislation, is found in statute books known as the Revised Editions of the Laws of the Federation of Nigeria. They continue to be the mainstay of civil legislation in Anglophonic Cameroon. In the law of contract therefore, it is essentially the common law principles and pre-1900 English legislation that apply. This is in contrast to the legal development in Nigeria where English law, although still a large part of Nigerian

12. See Ordinance No. 73-14 of 10th May 1973 regulating Insurance Companies; Ordinance No. 73-27 of 30th August 1973 regulating Banking Activities.

13. S.15 of the Southern Cameroons High Court Law 1955.

law, has considerably diminished in importance since independence as a result of the growing weight and importance given to local legislation.⁽¹⁴⁾

The precise scope of application of the common law, the doctrines of equity and statutes of general application has never been determined. It is not the intention to explore the precise application of the above. It must be observed however that the Anglophonic Courts in Cameroon have continued to cite and follow English cases, particularly those of the Privy Council, the House of Lords and the Court of Appeal, except where the decision of the court is entirely based on a piece of post 1900 legislation.⁽¹⁵⁾

Furthermore, customary law which is neither repugnant to justice, equity and good conscience, nor incompatible with any law in force is applicable. S.27(3) of the Southern Cameroons High Court Law 1955 however states that "no party shall be entitled to claim the benefit of any native law and custom if it shall appear either from express contract or from the nature of the transaction out of which any suit or question may have arisen that such party agreed that his obligations in connection with such transactions shall be regulated exclusively by English law or that such transactions are transactions unknown to native law and custom."

Sub-section 4 provides that: "In cases where no express rule is applicable to a matter in controversy, the court shall be governed by the principles of justice, equity and good conscience."

In the Francophonic Provinces, the same picture can be seen. Unlike

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14. D.E. Obilade, "The Legal System Since Independence," in T.O. Elias, Law and Social Change in Nigeria, (Evans Bros.Ltd., 1972), pages 23-33.
 15. Because there are very few areas in the civil law of England which have not been subject to legislation it is now difficult to find any decision which is not related to some statutory provision. In family law, English legislation is still applicable in Anglophonic Cameroon.

Senegal and Ivory Coast which have elaborated Civil Codes of their own, Cameroon still relies heavily on received French legislation: Codes and numerous other statutes which were applicable in French Equatorial Africa. In addition a lot of legislation was passed during the colonial period. The law of contracts is however nearly entirely based on the French Civil Code⁽¹⁶⁾ which has been supplemented by "doctrine" and "principes généraux" put forward by eminent French legal scholars.⁽¹⁷⁾

C: Law Reform and the Legal Profession:

On the 9th of February 1973, President Ahidjo, talking about law reform during a Press Conference, said: "This is both an urgent and delicate task. Urgent because it is obvious that sets of laws which correspond to different principles cannot co-exist for long within a unitary state: delicate because it affects the traditions and values of men."⁽¹⁸⁾

This view encapsulates the problems facing the Cameroonian law reformer. On the one hand, the 1972, June 2nd Constitution which created a unitary state was patterned on the 1958 French Constitution. It created a highly centralised government, giving the President "imperial" powers.

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16. In France, other laws have been passed to modify certain provisions of the civil code, for example, Law No.78-23 of 10th January 1978 on "Contrats d'adhésion". Such laws are not applicable in Cameroon.
 17. Legal scholars have always wielded considerable influence on the development of the law in France. The Civil Code drew very largely on Domat's "Les lois civiles dans leur ordre naturel", 1689-94 and from Pothier's Traité des Obligations, 1761. Their role is not merely to expose de legelata, but also de lege ferenda. Outside the legislature, they are the most potent force in French legal development. Pre-eminent among these jurists, in the realm of contract, today, are: Marty G, Rénaud P, Henri, Léon and Jean Mazeaud, Jean Carbonnier, Boris Starck, Savatier, Ripert Planiol.
 18. ACAP Daily News Bulletin, 10th February, 1973.

This centralisation pervades not only the country's politics but as will be seen later, the country's economic structures. The seven provinces of the country have since 1972, become very intricately knitted together. On the other hand, the substantive as well as the procedural laws in two of the seven provinces are different (very radically different in certain aspects) from the laws prevailing in the other five provinces. This situation is exacerbated by the existence of customary law (which differs from one tribe to another) and also of Islamic law. While conceding in principle that legal pluralism may be better suited to achieve the ends of justice in the pluralistic society that Cameroon is, the costs incurred in terms of the inconvenience and uncertainty resulting from this state of affairs are too heavy. It is surely contrary to the interests of both foreign and local investors, of lawyers who wish to practice in both the anglophonic and francophonic provinces, of business concerns, and not least, of law students who would undoubtedly find it easier to grapple with a legal system based on fairly uniform principles, than one which comprises common law, civil law and customary law principles.

In very decentralised countries, for example the United States of America, a lot of intellectual and material effort has been spent in trying to evolve fairly uniform principles for the entire community; hence, the elaboration of the American Restatements of the law of contract, the Uniform Commercial Code. Such efforts should '*a fortiori*' be made in a centralised country such as Cameroon where there is an evident need for uniformity of law. Helas, this has not been the case. The most important single hurdle standing in the way of uniformity is that of bridging the gulf that exists between civil law and common law traditions.

The problems involved in harmonising the battery of local customs that exist are also considerable.

In connection with law reform, Cameroon, in the footsteps of France, has opted for codification. In 1964, four years after independence, two Federal Law Reform Commissions were formed and were given the hard task of preparing a Code of Civil and Commercial Obligations and also a Code of Civil Procedure. The Commissions, oddly enough, were made up exclusively of judges, advocates, traditional Chiefs and religious leaders. They did not include any university law teacher, anthropologist or sociologist. This may explain why none of these codes saw the light of day.

The only major works of codification so far are the Cameroon Penal Code, and the Labour Code. They did not however result from a real process of law reform. Rather, they were the consequence of a purported exercise of harmonising the laws that prevailed in both East and West Cameroon as they then were. In this process, the rule of the majority won the day. The Labour Code for example was nearly a complete replica of the French "Code du Travail d'Outre Mer" of 1952. The only principle borrowed from the labour legislation in the then West Cameroon were those relating to union organisation and labour inspectors. There was very little, if any, fresh thinking on the subject. It did not however take long for the legislature to come to the realisation that the code did not take local factors into consideration and had become virtually ineffective. In 1974, it was completely withdrawn and a new one with significant differences was promulgated.

All too often, law reformers in Cameroon have had "the tendency to look at law reform ... as a struggle between the common law and the civil law as to which system would emerge victorious...".⁽¹⁹⁾ It is submitted that this tendency is parochial and regrettable because it does not enable the law reformers to approach their subject in a dispassionate and original manner which they certainly must do if they have to bring forth recommendations relevant to the socio-political and economic context of Cameroon.⁽²⁰⁾ The nature of the bar and the judiciary (magistrature as commonly referred to in Cameroon) has not in any way helped the plight of law reform in Cameroon. While observers such as academics, journalists etc., are useful forces in the law reform process, the judiciary and the bar who are amongst the primary participants of the administration of justice ought to be very involved. This had not however been the case for a number of reasons. Foremost among them is the fact that the legal establishment, i.e. the highly successful practising lawyers⁽²¹⁾ received their legal training

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19. Anyangwe, Carlson, The Administration of Justice in a Bi-Jural Country - The United Republic of Cameroon, Unpublished Ph.D. Thesis, University of London, 1979, page 1270.
 20. While interviewing one of the legal scholars in Cameroon, Professor Stanislas Melone, on this subject, I realised that this tendency is not only ingrained in judges, but also (sadly) in some academics. His view is that what is required in so far as law reform in Cameroon is concerned, is to take the French law as a basis and then to proceed to make good any flaw that is apparent by borrowing from English law. It is submitted that this manner of proceeding with law reform by forging what amounts to an uncomfortable compromise between two alien systems of law is not only misguided, but it is also productive of laws which do not mirror forth the particular circumstances and the changing realities of Cameroon.
 21. Like many other African countries, there is not specialization into solicitors or advocates among practising lawyers in Cameroon. Public Notaries however constitute a distinct and separate group of legal practitioners. Their role is essentially to authenticate legal documents and instruments such as contracts, leases, conveyances etc. They are appointed by the Minister of Justice from among leading practitioners in good standing. They do not, however, represent the State.

either in France or in England and have been imbued exclusively with either the French or the English law traditions. They have no particular desire to modify the laws, which might thus introduce them to something outside their legal culture.

Secondly, until very recently, they have been very small in number, thus enjoying exclusive status with all that goes with it. It is therefore in their interest that the status quo should not be disturbed. Their clientele consist essentially of the business community - middle-men, traders, property developers etc., and the growing professional middle class who more than any other group, benefit from the existing laws (especially in connection with commercial matters). This makes the lawyers obsequious to these classes, thereby stifling any desire on their part to lobby for any changes in the law.

Similarly, the judiciary is not very well suited to actuate law reform. Following the French tradition, judges in Cameroon have a status akin to that of civil servants.⁽²²⁾ Contrary to the English tradition of appointing judges from leading members of the bar, in Cameroon, judges are trained. Any person wishing to become a judge must possess a law degree equivalent to the Licence-en-Droit or LL.B. and undergo a two year course at the National School of Administration and Magistrature, subject, of course, to an entry examination.

The notion that the introduction of new laws is strictly within the

22. The only significant difference between judges and the rest of civil servants is that they are protected from arbitrary dismissals and sanctions. In this respect, the Higher Judicial Council which is made up of senior judges and president over by the Head of State, is the only body which has the power to sanction or dismiss any judge for gross misconduct.

compass of the legislature and the executive is deeply implanted in them.⁽²³⁾ The judges therefore do not possess the sense of independence nor the necessary volition which it takes to make any proposals for law reform either in their judgements, or outside the courts.

Another problem facing the judiciary is the paucity of personnel. The 1972 judicial organisation decree attempted to tackle this problem by reducing the number of jurisdictions. The problem persists, none-the-less.⁽²⁴⁾

There is however a glimmer of hope. In the few years past, graduates from the Faculty of Law and Economics in the University of Yaounde, who have been sufficiently grounded in both French and English law have been admitted into the judiciary. Because they have received a more or less

23. Some Anglophonic judges, particularly those who began their careers in the colonial era and immediately afterwards, have nevertheless vigorously spoken out in favour reforming the law. Their number is however dwindling. Foremost among them is the former Chief Justice of West Cameroon, now President of the Court of Appeal in the South-West Province, S.M.L. Endeley, C.J.

24. M. Nkounjin, "Soliloque Sur Certains Problems Soulevés Par L'Organisation Judiciaire de la République du Cameroun", 'Receuil Penant', Vol. 86, 1976, page 5. Mr. Nkounjin cites two cases to demonstrate the extent of this problem:- In 'L'Affaire Evina Aben', the plaintiff who won a judgement in a personal injuries case waited for more than two years before recovering the judgement debt because the presiding judge could not find time to write out and sign his judgement as required by the Civil Procedure Code.

In 'L'Affaire Thérèse Ndankeu', a land dispute had to be adjourned for more than two years: from February 1973 to April 1975.

homogeneous legal education, and also because they are less conservative than their older colleagues, one can only hope that they can provide the impetus needed for law reform. There has also been renewed government interest in the subject. A Law Reform Commission for the preparation of a criminal and a civil procedure code was set up in 1976. Its draft criminal procedure code is expected soon.

D: Access to Justice in Cameroon.

The focus here, is on two aspects of the legal system in Cameroon: the cost of obtaining justice and the availability of legal aid and legal advice to the public.

(i) Costs:

The Cameroonian constitution proclaims the principle of equality before *justice* in its preamble. Section 6(1) of the Judicial Organisation Ordinance, 1972, statutorily provides that justice shall be administered "free of charge, subject to the fixed provisions concerning stamp duty and registration". These declarations appear however to be merely formal declarations, void of any content as the evidence shows.

The problem of costs is becoming increasingly important for a number of reasons. There has been, particularly during the past decade, a significant transformation of the economic and social relationships brought about by the influx of foreign multi-national companies, the proliferation of local businessmen and the growth of bureaucracy. These factors have triggered off an increase in litigation.

The initial costs incurred by the Cameroonian litigant are court fees of which there are two categories: filing costs and service fees. The amount payable as filing costs depend upon the pecuniary value of the claim. In the Court of First Instance, which, it may be recalled, deals with cases involving claims the pecuniary value of which does not exceed 500,000 frs CFA (obviously dealing with all small claims), the filing costs in the Anglophonic Provinces differ from those of the Francophonic Provinces. In the former, for any action where the claim is 10,000 francs the filing cost is 700 francs.⁽²⁵⁾ Where the claim is 50,000 francs, the fee is 2,600 francs; where it is 100,000 francs the fee is 3,900 francs, where it is 200,000 francs, the fee is 7,800 francs. The maximum payable is 18,500 francs, where the claim is 500,000 francs. In the High Court, where the pecuniary value of the claim is above 500,000 francs, the filing fee is 25,000 francs. In the Francophonic provinces, the filing costs are calculated at 3 per cent of the pecuniary value of the claim.

In addition to filing costs are service fees. In the Anglophonic provinces, the cost is 70 francs per document, plus a mileage charge. In the Francophonic provinces, it is 1200 francs per document served.

To these costs should be added travel expenses to and from the courts. Furthermore, each plaintiff or defendant has to cater for his witnesses, unless such witnesses have been summoned by the court, in which case the court pays their expenses. Given that there are many districts without courts, these expenses may be heavy if the parties have to travel long distances, as they often do.

25. Note: Fifty C.F.A. (Communauté Franc Africaine) francs are equivalent to one French franc.

Needless to say, in civil cases, evidence has to be collected and this entails more expenditure, some of which may be very high if experts such as doctors, accountants, architects, surveyors etc., have to be consulted.

The charges of counsel where any party chooses to hire one are not uniform. They have not come under strict regulation.⁽²⁶⁾ They vary from one counsel to another. Contingency fees are common in insurance claims.

It is obvious from the above that the costs of litigation are quite high, to put it mildly, and that they are enough to discourage an average Cameroonian from bringing an action before the courts. This is so especially where the award the court might give is not very substantial. The consequences of this state of affairs have been spelt out by Dean Roscoe Pound in his book, "The Spirit of the Common Law". He wrote: "It is so obvious that we have altogether ceased to remark it, that in petty causes - that is, with respect to the everyday rights and wrongs of the great majority of the urban community, the machinery whereby rights are secured practically defeats rights by making it impracticable to assert them when they are infringed. Moreover, there is danger that in discouraging litigation we encourage wrongdoing..."⁽²⁷⁾

26. Practice in the Cameroonian Bar is governed by Law No.72-LF-5 of 23rd May 1972 as amended by Decree No.72-706 of 13th September 1972; No. 74-11 of 16th July 1974; No.76-16 of 8th July 1976; No.77-13 of December 1977. There is also the Internal Rules and Regulations of the Bar (unofficial). None of these, however, prescribe the amount counsel might charge in any given case or for any particular service.

27. Cited in R. Egerton, Legal Aid. (London, Kegan Paul, 1945) page 4.

(ii) Legal Aid:

The problems posed by the high costs involved in bringing an action before the courts have not gone unnoticed by the Cameroonian government. Before 1964, only very limited legal aid was given and it was restricted to those who were criminally charged.⁽²⁸⁾ Under the Federal Government, Decree No.64-DF-155 of 6th May 1964, amended by Decree No.65-DF-93 of 2nd April 1965 was enacted, setting up a system of legal aid which extended to civil actions.

These decrees were later repeated and Decree No.76-521 of 9th November 1976 was issued and it covered all types of legal aid the citizen was entitled to.

The first and the most welcome change the new decree brought about was the establishment in every court in the entire country of a Legal Aid Commission. Section 1 of the decree stipulates that legal aid is granted "in order to enable a natural person, party to a trial or in an ex-parte proceeding, to obtain judgment or the order applied for, or their execution, with dispensation to advance all or part of the legal fees he ought normally to bear". The implication of this Section is that legal aid is limited to cases which are before the courts. This is deplorable because the main problem facing most ordinary Cameroonians is their inability to ascertain whether or not their rights are being infringed.

The Legal Aid Commission examines applications for legal aid. The applications have to be accompanied by a number of documents, such as a

28. See Order 7. rule 83 of the Federal Supreme Court Rules, 1961 (Revised Laws of the Federation of Nigeria) and in the former East Cameroon, Decree No.60-224 of 5th December 1960.

certified copy of the applicant's tax return, a certificate from the local council indicating whether or not the applicant is subject to the minimum fixed tax. Legal aid is granted primarily by reason of the applicant's pecuniary situation; but the commission also looks at the importance to the applicant of the exercise of his right. The commission may also invite the adverse party to the action to challenge the applicant's right to obtain legal aid. The decision of the Legal Aid Commission must then be substantiated by a reasoned judgment.

Only three categories of persons are entitled to legal aid as of right: injured employees, deserted wives, and any person appealing against a death sentence. Apart from these categories of persons, those to whom legal aid may be given are:- (i) indigents, (ii) the rank and file of the armed forces, (iii) persons subject to the minimum annual fiscal tax; (iv) a wife in divorce proceedings, if she is a mother of an infant child and has no income of her own, and (v) persons other than those already mentioned where the anticipated expenses of the action cannot be borne by their resources, initially thought to be sufficient.

An advocate commissioned under the legal aid scheme is reimbursed the costs of travelling and accommodation, the costs involved in conducting the case (collecting evidence etc.), and he is paid 5000 CFA francs as retainer fee per day throughout the trial. Needless to say, this affords only the barest remuneration for his task. Nine out of ten prominent advocates I interviewed said they would not appear for persons with legal aid. Most of them voiced the feeling that not only was the remuneration infinitesimal in comparison with the time they would normally put in such

cases, but also that recovery of even these small sums was rendered difficult by administrative red-tape.

The basic reason for the reluctance of advocates to deal with litigants benefiting from the legal aid scheme appears to be that because they are operating within what is essentially a market economy, and because they are, like other professional people such as doctors or architects, in short supply, they tend to deal only with those who can afford to pay them more. The unfortunate upshot of this is that with the exception of persons appealing against death sentences where the State mandatorily provides a counsel and also the possible exception of cases where there is a sizeable claim (in which case the advocate usually deals with the client on a contingency fee basis, irrespective of legal aid), more often than not, legal aid only means that the beneficiary of it is merely exempted from paying court fees and his witnesses' travel expenses. The assistance of a barrister is a rarity.

(iii) Legal Advice:

"Insofar as knowledge of what is available is a prerequisite to any solution of the problem of unmet legal need, much more needs to be done to increase the extent of the public awareness of available facilities and how to use them".⁽²⁹⁾ This statement, although made in a different context, summarizes succinctly the most pressing need of the Cameroonian Legal system. It has already been observed that the fact that legal aid is confined to actions before the court, is indeed a regrettable one. Regrettable because as is the case with most of the less developed countries,

29. B. Abel-Smith, M. Zander and R. Brooke, Legal Problems and the Citizen (London, Heinemann, 1973), p. 22.

the almost total ignorance of rights and the inability to obtain legal advice is a deep rooted malaise affecting the bulk of the Cameroonian population.

Bringing an action, irrespective of the costs or the availability of legal aid, presupposes that the party can, even in a rudimentary sort of way, define the wrong he has suffered in legal terms, and also that he can determine how to go about enforcing his right, to say nothing about the probability of success or failure in so doing. This presupposition is reflected in the adage that "ignorance of the law is no excuse". The falsity of this assumption and its converse, i.e. that everybody knows the law and maybe the legal system is so obvious in the Cameroonian context that any specific demonstration of it is otiose.⁽³⁰⁾ Although this problem has been recognised by the Ministry of Justice, very little, if any, affirmative action has been taken to even attempt to solve the problem. In a survey I carried out in the Yaounde area (the capital) in March 1982, only two out of fifty common people knew of the existence of the legal aid scheme.⁽³¹⁾ This demonstrates the acuteness of the problem: those who are supposed to be the beneficiaries of the legal aid system hardly know of its existence. If the problem can exist in such a measure in the Yaounde area, one can surmise the dimension it will take in the rural

30. More than 80 per cent of the adult population is still illiterate.

31. Those who know about the scheme came about the knowledge mainly through relatives who either worked with courts or from previous experiences in courts. Among the persons interviewed were twenty self-employed persons; twenty others worked with governmental departments (none of them had anything more than a secondary education); and the other ten were unemployed. One of the self-employed persons said he had applied for legal aid in an action against him for tax evasion. The other person who knew of the legal scheme was an office-messenger with the Ministry of Transport.

and remote areas of the country.

It is submitted that the problems raised here have a direct implication for the rest of the discussion to follow. Laws and regulations which are designed for the protection and advancement of the public will certainly be ineffective if they cannot operate in a context which ensures not only that the public knows of their existence, but also that the public can effectively use them in enforcing their rights whenever they are infringed. The problem of "access to justice" is therefore an integral part of the study of standard form contracts.

Section II: Cameroon's Economic Framework:

Most, if not all, contracts, whether they involve goods, real property or services, are necessarily economic activities. This is '*a fortiori*' true of the types of contracts which will be the subject of this thesis: standardized contracts. It is therefore appropriate that a thesis of this kind should begin with a study, however concise, of the economic framework of Cameroon, especially as most of the standard form contracts to be studied emanate from some of the most prominent economic institutions of that country.

A study of the outlines of the economy is vital for yet another reason. Although this is not the place to enter into a debate about the ideological underpinnings of law, the fact that the philosophy underlying any country's economy determines to a very large extent the nature of its laws - particularly in the areas of property and contract law -, has almost become trite observation.

A: General Features of the Economy.

It does not require a detailed examination of the Cameroonian economy to realise that like most less developed countries, Cameroon has not yet escaped from some of the intractable problems that beset its efforts in development such as the lack of sufficient capital, the low levels of technology and know-how, the limited size of the market, and the high level of rural unemployment.

The first general characteristic of the Cameroonian economy is that it has not yet achieved a break from the colonial structure which was imposed on it by her colonial powers - Britain and France. The "économie de traite" persists.

How far the colonial framework has impeded the economic growth of less developed countries is an issue which is still the subject of a great deal of controversy.⁽³²⁾

The fact remains, however, that Britain and France, under the impetus of Free Trade, used their colonies essentially as sources of raw materials. This "blood and plunder" imperialism established its own division of labour by which metropole countries came to be regarded as the sources of exotic consumer products which could not be made in the colonies.

To be sure, the colonial powers had, and have ever since, continued to possess the technology necessary to sustain industrial production. However, they positively stifled the growth of any form of manufacturing industry that attempted to emerge in the colonies.⁽³³⁾ Industrial production was considered to be a risky business in the colonies. The

32. See Bauer, P.T., and Yamey, B.S. The Economics of Underdeveloped Countries, 2nd edn. (1970), pages 86-93. Time and space prevent an examination of this controversy.

33. Brown M. Barratt, After Imperialism, (Heinemann, 1963), page 47.

colonial framework therefore prevented the emergence of those conditions which are prerequisite for any meaningful programme of economic development. This state of affairs had two very obvious and significant consequences for the Cameroonian economy. The first is that the industrial tissue of the country is very small, thus making agriculture the principal employment of the bulk of the population. The second is that the idea that the former colonial powers (France especially), are the source of exotic consumer goods is still strongly held. Hence, in the big cities such as Yaounde and Douala, the "consumption pattern" that exists there is different only in scale from that of Paris and Lyons, thereby transferring most of the country's earnings from agriculture to manufacturers in France.

The second general feature of the economy is the scarcity of capital. The role of capital in the economic growth of any country can hardly be overstressed. Even in agriculture, equipment, however primitive is essential; machines, buildings, tools, roads etc. During the colonial period, nearly all that was produced was consumed, i.e. income from the sale of cash crops was spent on consumer goods. It therefore took a good many years before any meaningful savings could take place in Cameroon. The main effect of the lack of capital is the underdeveloped state of technology and the economic infrastructure of the country. Capital is important not merely to give industry a boost but also to enhance the growth of the agricultural sector which is responsible for the limited amount of capital that has been so far created. Hence, the less capital accumulation, the lower the growth of the agricultural sector becomes. The government has tried to break this vicious circle by appealing to foreign aid, which has been mainly French.

The third noteworthy characteristic of the Cameroonian economy is the smallness of the national market. As Adam Smith put it, division of labour and specialization are based on the size of the purchasing power and the size of the market. There are two foremost reasons for the smallness of the market in Cameroon. The first is the fact that there is no real national market because of an extremely poor communications network within the country. The second is that there is a very inequitable distribution of income which itself has a lot to do with the widespread unemployment in the rural areas where about 85 per cent of the population live.

Finally, the economic strategy of the country is characterized by what its architect, President Ahidjo, calls the policy of "planned liberalism". If this epithet appears to be vague, or even contradictory, its import is by no means so. It is a policy which holds that private initiative or enterprise is the best means by which the country can be developed and that state intervention should be limited to the mobilisation, coordination and the orientation of efforts for progress. Hence, there is a strong bias towards private investment in Cameroon.

Section III: A Brief Survey of Cameroonian Economy. (34)

A: Agriculture.

Agriculture manifestly holds the pride of place in the Cameroonian economy as earlier mentioned. It is the primary generator of resources for the development of the country. Secondly, it is the sector par excellence which does most to alleviate the employment problem of the

34. See generally, United Republic of Cameroon: Annual Year Book 1978 (Yaounde).

country. There are three basic reasons for this situation. In the first place, about 80 per cent of the country's 8 million inhabitants live in the rural areas where the only important economic activity is agriculture. Secondly, agriculture furnishes nearly 70 per cent of all Cameroonian exports and about 40 per cent of the Gross National Income, and also, the bulk of its foreign exchange earnings. Hence, Cameroon has chosen agriculture as its platform for eventual modernisation and industrialisation. This sector therefore enjoys the widest financial and other material assistance from the government. Finally, there is the natural factor, i.e. the wide variety of ecological and climatic conditions enjoyed by Cameroon which enables agriculture to come out as the most worthwhile of economic activities.

In spite of this manifestly important role agriculture plays in the Cameroonian economy, there is nevertheless a lot of under-employment in this field. Less than 5 per cent of the surface area of the country is under cultivation and of this, only about two-fifths accounts for cash-crop cultivation. Farming methods are still very rudimentary; modern methods are carried out only by agro-industrial companies and mainly with respect to the cultivation of sugarcane, oil-palms, rubber, banana and cotton.

The country's main cash crops are cocoa and coffee (both arabica and robusta). The government, conscious of the importance of these crops, has set up two institutions which are expected to provide impetus further growth: SODECAO (Société pour le Développement du Cacao), the Cocoa Development Corporation, and a Stabilisation Fund, which guarantees a single yearly price for all farmers.⁽³⁵⁾ This fund bears the differential

35. Njike Nembo Michael - Les Caisses de Stabilisation des Prix, Mémoire présenté à la Faculté de Droit et Sciences Économiques, (Yaoundé, 1973-74), unpublished.

tariff paid on the presentation of way bills. For the 1973-74 season for example, the price guaranteed for robusta coffee was 130 frs CFA per kilo. Meanwhile, in the French and the E.E.C. Market that same year, the price for a kilogram of robusta coffee was 350 CFA francs. The marketing of these cash crops is carried out essentially by the National Produce Marketing Board. Both crops are cultivated on a surface area of about seven hundred and thirty hectares, giving employment to about three million Cameroonians.

Large scale farming is carried out by agro-industrial complexes. The C.D.C., (Cameroon Development Corporation), a para-statal corporation in the South-West Province of the country, grows oil palms, rubber, tea and bananas. It is one of the country's biggest employers, with a workforce of about twenty thousand. Oil palm and rubber cultivation is also carried out by Plantations Pamol du Cameroun (S.A.), Lobe, Ndian, a subsidiary of UNILEVER. It accounts for about one-eighth of the country's total rubber production and a third of the oil palm production.⁽³⁶⁾

SODEBLE, another para-statal corporation in the north of the country produced one hundred and twenty five thousand tons of wheat in 1977/78. The growing and marketing of cotton is handled by SODECOTON, (La Societe pour de Developpement du Coton). Cameroon's sugar production is handled by two large factories in Mbandjock - SOSUCAM and CAMSUCO. Between them, they produce about eighty thousand tons of sugar (1977/78 figures).⁽³⁷⁾

36. J.C. Bartier, G. Courade, J. Tissandier, "Complexes agro-industrielles au Cameroon," in Travaux et Documents de L'ORSTOM, ONAREST, YAOUNDE, pp. 17 and 91.

37. "Complexes Agro-industrielles au Cameroon," supra, pp. 249-251. Other types of agricultural productions, such as rice and tobacco are listed in the above.

Because of the vital role of agriculture in the Cameroonian economy, the need was soon felt for the creation of an institutional frame-work to provide extension services and credit to small farmers particularly. Hence the FONADER - "National Fund for Rural Development" was created.⁽³⁸⁾ This institution has a dual role: In the first place, it helps to promote economic and social development programmes in the rural areas. It participates in the realisation of programmes which include, among other things, the setting up of young farmers, subsidising the purchase of fertilisers, improving rural water supply and other material assistance in the interests of the rural population. Its other function, which is more relevant here, is that it is a credit institution. It gives credit to both individuals and co-operatives for a wide range of agricultural activities, viz., fishing, cattle rearing, forest regeneration, and even rural housing projects. The contracts it makes with the recipients of the loans will be among the standard form contracts to be examined later. Any person carrying out any of the above activities may apply for a FONADER loan provided they present an economically profitable and coherent investment programme. Unfortunately, because of administrative complexities and the exceedingly stringent guarantee requirements FONADER imposes, much fewer farmers have benefited from the scheme than was originally hoped for.⁽³⁹⁾

38. Decree No.73-24 of May 29th 1973 (Journal Officiel, 1973).

39. Since it will soon be transformed into a bank, FONADER is in a dilemma. Should priority be given to the "development" aspect of the scheme, in which case it runs the risk of being less efficient, especially with regard to debt recovery, or should priority be given to efficiency, in which case the development aspect would certainly be down-graded? A survey of the scheme I carried out showed that about half of the beneficiaries were civil servants, many of whom channelled the loans to purposes other than those for which they were given.

In 1979-'80 credits given out amounted to 2,796.638.790 francs C.F.A.

It is obvious that strict controls have to be made since the capability of the bulk of the borrowers to manage their projects successfully and realise sufficient profits to repay the loans is not significant, to say the least. However, it is questionable whether these strict measures are entirely in the right direction if the scheme has to improve the lot of the rural agricultural population and not to be exploited by urban bureaucrats. FONADER is funded essentially by state subsidies, forest royalties, loans from other credit institutions, especially the B.C.D. (Banque Camerounaise de Développement), profits made by the National Produce Marketing Board, and a general surtax.

B: Industry.

Cameroon's industry, which saw a substantial growth during the first ten years following independence, appears to be going through a decline since the seventies. Although there is undoubtedly a non-negligible industrial network, it should be pointed out that the industrial infrastructure is very insubstantial. There are fewer than one hundred companies involved of which only about ten of them arrogate for themselves nearly 55 per cent of the total industrial output. There is one fundamental reason for this. Since 1970, the government's strategy has been "planned liberalism". Although state involvement was not insignificant quantitatively or qualitatively, it never assumed the dynamic role of direct intervention in industry. It merely created the appropriate conditions for foreign investments and when necessary, complementing them. Thus, an examination of the share holdings in the existing industries reveals a very lop-sided

ownership in favour of foreign investors. Even among foreign investors, there is a strong bias for French investors in particular, who dominate Cameroonian industry with as much as 45 per cent of the total ownership. There are only two areas in Cameroon industry where the French are absent: the exploitation and transformation of sea products and also the leather and shoe industry. The policy of "planned liberalism" not only opened the doors widely and generously to foreign investors, but it also discouraged the growth of a truly national industrial sector.

This policy however appears to be undergoing a volte-face. On the 25th of August 1976, President Ahidjo, outlining the general characteristics of the fourth Five-Year Development Plan (1976-1981), said: "The orientation of savings towards industrial development, the elaboration of a rational policy for public participation, the encouragement of dynamic and responsible national entrepreneurs, will enable Cameroonians to take control of the management of the national economy".⁽⁴⁰⁾

There has therefore been, since 1977, a shift in policy. The public sector has now become the vertebral column of the new industrialisation programme, the aim of which is to provide a more efficient industrial structure, oriented especially towards the exploitation of natural resources. Since 1977, new factories have been built entirely with public participation and among them may be mentioned CAMSUCO (Cameroon Sugar Corporation), HEVECAM, a rubber processing factory. A National Hydrocarbon Corporation, (S.N.H.) was set up in 1980 for the exploitation of oil, gas and coal.

40. Quatrième Plan Quinquinal de Développement, Yaounde, 1976 (my translation).

In 1980-81, about 20 per cent of the Cameroonian budget was accounted for by revenue from oil exports. In 1981 a new oil refinery built in Cape Limbo, Victoria, went into operation in 1981 and increased income from oil exports is expected to finance further industrial projects.

Foreign participation as pointed out earlier on, dominates Cameroonian industry. In 1977, it contributed about 57.5 per cent of the entire capital outlay of all factories engaged in production. Indeed, excluding agro-industry and electricity and water supply industries, where Cameroonian holdings are 73 per cent and 80.5 per cent respectively, foreign participation in the rest of Cameroonian industry is more than 77 per cent.⁽⁴¹⁾

Of the 42.5% Cameroonian holdings, about 39 per cent is held by the State. This leaves approximately 3.5 per cent for private Cameroonian holding which is negligible, to say the least.

Hence, when dealing with industrial firms, more often than not one is dealing with either para-statal corporations or with foreign owned companies. These foreign owned companies are usually affiliates of large conglomerates; generally, trans-national corporations. This is especially true of French owned companies which belong generally to the following conglomerates: RIVAUD (in agro-industry and timber industry), SGOA (Societe Commerciale Ouest Africaine), OPTORG, CFAO, CCCE. Non-French participation is essentially in the leather and shoe industry. Here, BATA (Cameroon) dominates the field and it is 70 per cent foreign (entirely

41. The following statistics come from the United Republic of Cameroon, "Annual Year Book", note (35), supra.

non-French) owned, with a 30 per cent Cameroonian holding. 67 per cent of the interests in the fisheries industry is also foreign (non-French). Non-French participation also accounts for 39 per cent in the timber industry, 37 per cent in the textile industry. Generally, Italian, Dutch, Spanish and British companies are involved.

The textile industry is dominated by CICAM and SYNTECAM with 75 per cent foreign ownership (mainly French and German). In the tobacco industry, the Société J. Bastos de L'Afrique, with an 80.6 per cent French interest and a 19.4 per cent Cameroonian public holding, has the monopoly. ALUCAM, a subsidiary of the French owned Pechiney-Ugine-Kuhlmann is the country's aluminium producer and top export earner in industry.

In electricity and water distribution, there are two monopolies: SONEL (Société Nationale d'Electricité) and SNEC (Société National des Eaux du Cameroon), in which Cameroonian public ownership is 80.5 per cent and French ownership 19.5 per cent (C.C.C.E. and Pechiney Kuhlmann).⁽⁴²⁾ In the drinks industry, S.A.B.C. (Société Anonyme des Brasseries du Cameroon) is dominant. French participation here is 69 per cent and Cameroonian participation is 23 per cent. Here also, there is Societe Guinness du Cameroon, which is 100 per cent foreign owned, and U.C.B. (Union Camerounaise des Brasseries), the only company with a 100 per cent Cameroonian private investment.

C: The Commercial Sector.

Here again, foreign companies have a stronghold on the Cameroonian economy. Most of the big trading houses are foreign owned:- SCORE,

42. Yearbook, supra, pp. 253-256.

Compagnie Hollando Africaine, SHO, R.W. Kings etc. However the retail trade is mainly in the hands of Cameroonian establishments which with very few exceptions, are either small or at best medium size. Lebanese, Greek and Indian ownership (the EMENS group for example), is not negligible.

The commercial road transport network is mainly Cameroonian. However, in the haulage business, MORV - (i.e. a foreign owned company) is the most important company. The railway system is run by a monopoly: REGIFERCAM (Régime Ferre' du Cameroon) which both Cameroonian and French owned. There is a national airline; Cameroon Air Lines, which is about 70 per cent Cameroonian owned and the rest of the ownership essentially goes to Air France.⁽⁴³⁾

From the mid-seventies, much stress has been put by the Cameroonian government on the importance of savings and Cameroon now has one of the most dense banking systems in Francophonic Africa. As with Cameroonian industry, there is a strong presence of foreign investors in the banking network. Since 1973, the Cameroonian government must own one-third of the shares of any bank operating in the country.

Until 1977, there were five main commercial banks exploiting the money market in Cameroon:- (1) The Société Camerounaise des Banques, S.C.B. "Alpha Bank" was created in 1962. Since 1975, its capital has risen to two billion francs. The Cameroonian government holds 35 per cent of the shares; 25 per cent is held by the Banque Camerounaise de Développement; Crédit Lyonnais of France holds 25 per cent. It is the

43. Yearbook, supra, pp. 242-244.

third commercial bank in Francophonic Africa south of the Sahara. (2) BICIC (Banque Internationale pour le Commerce et l'Industrie du Cameroon). This bank deals mainly with small and medium size businesss - industrial and commercial. 65 per cent of the shares of this bank are held by foreign companies. Barclays International owns 17.5 per cent, SFOM (France) owns about 33 per cent and the Cameroonian government owns 35 per cent. (3) Cameroon Bank Ltd., which originates from the former West Cameroon is the only bank with a 100 per cent Cameroonian holding. It was created in 1961 with a capital of 300 million francs owned by the National Produce and Marketing Board, the National Re-Insurance Fund and the "Société Nationale d'Investissement" (S.N.I.). (4) The S.G.B.C. (Société Générale des Banques du Cameroun) was created in 1963 and its shares are divided between the Cameroonian government and Societe Generale, the French owned banking group. (5) B.I.A.O. - Banque Internationale pour l'Afrique Occidentale was created in 1974.

Since 1977, two new banks have been founded: Chase Bank of Cameroon and Boston Bank of Cameroon in which the Cameroonian government owns one third of the shares, while their American parent companies own the rest.

The Cameroon Development Bank is not a commercial bank. Created in 1964, its status was revised in 1976 by decree No. 76-89 of 3rd March 1976. It now has a capital of six billion francs C.F.A. Article 3 of its statute states that its object is to provide in the form of loans, technical and financial assistance to any project which promotes the economic and social development of the country, with particular emphasis on the promotion of industry, trade and handicrafts.

During the 1977/78 financial year, 15,885 million francs were lent out, 61 per cent of which was for agricultural and forestry projects, 15 per cent for housing and consumer credit, and 6 per cent for industrial projects. 70 per cent of the loans were given on short term.⁽⁴⁴⁾ The S.N.I. (Société Nationale d' Investissement), a public corporation is also one of the important financial institutions in the country. Its role however is limited to buying up shares for the government in industry.

Consumer credit is not yet highly developed in Cameroon. Most commercial banks finance consumer transactions particularly with respect to the purchase of cars and expensive household equipment. There are a few firms, however, which deal exclusively with consumer credit, the most important of which are SOCCA (Société Camerounaise de Crédit Automobile) and S.C.E. (Société Camerounaise d'Equipeement). The former is an affiliate of the French group S.A.F.C.A., and was established in 1959. It finances the purchase of about 40 per cent of the cars imported in Cameroon. The latter gives short term credits with respect to the purchase of things such as household furniture, refrigerators, stereos, motor-bicycles etc. Besides these institutions, the big trading houses also give consumer credit.

The above is merely an outline which will help to put the various kinds of contracts to be discussed later in perspective. As with all outlines, all details have been left out. Indeed there are some parts of the economic structure such as housing and insurance which have not been discussed at all.

44. Banque Camerounaise de Développement, Rapport d'Activités, Exercice 1977-78, p. 13.

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44. Banque Camerounaise de Développement, Rapport d'Activités, Exercice 1977-78, p. 13.

The above exposition, however, shows that the structure of the Cameroonian economy has not dramatically changed from what it was during the colonial period. Although there is much more manufacturing industry going on, this is largely confined to light industry, most of which belongs to foreign companies anyhow. The economy therefore still bears the traits of an "économie de traite", based primarily on agriculture which provides foreign exchange for the importation of foreign (French) goods.⁽⁴⁵⁾ Because private initiative was the hallmark of the economic policy, it is not surprising that there is such a dearth of Cameroonian industrialists since few had the required bankroll to undertake industrial ventures.

The consequence of this in terms of social formation, has been the creation of a class whose function has been to act as intermediaries between the urban consumer population and the rural agricultural community on the one hand, and local or, as it is more often the case, foreign producers of consumer goods on the other. A strong merchant bourgeoisie class as it were. There has recently, however, been an increase in state participation in the marketing of agricultural produce and also in the running of light industry and financial institutions. The third sector has thus greatly increased, and this has been followed by a hypertrophy in bureaucracy. In all this, the rural population, the bulk of the entire population, stand to lose since they do not enjoy the fruits of the third sector nor that of the bureaucracy, in spite of being the main source of the wealth of the country.

45. Samir Amin, Unequal Development, (The Harvester Press, 1973), 329-332.

CHAPTER TWO: A GENERAL THEORY OF CONTRACT LAW

Introduction

The law relating to standardized contracts is an aspect of the general law of contract. It appears therefore that it cannot be examined in isolation from its context. Hence we shall begin with an analysis of the law of contract. The classical theory of contract is based on the idea of freedom of contract which was an offspring of the laissez faire economic theory of Adam Smith. This chapter seeks to demonstrate that long after laissez-faire was abandoned, the courts continued however, to regard freedom of contract as their mainstay in contractual theory. This chapter will show how unrealistic this judicial attitude was, given the fact that people were not free to enter into contracts on their own terms. Furthermore, the assumption underlying the concept of freedom of contract was that there was free and unlimited competition and also that the contracting parties were equal economic participants, assumptions which on the evidence have proved to be unfounded. The idea of freedom of contract is very much out of touch with reality in the developed world, let alone when applied in the less developed countries such as Cameroon where there are even greater disparities in the bargaining power and know-how between the local farmers and consumers on the one hand, and the emerging corporations on the other.

If it is proved that the idea of freedom of contract is not only a superannuated idea but also a fictitious one, then its corollary, the sanctity of contract should also fall to the ground since it is predicated on the idea of freedom of contract.

It is possible to examine the law of contract as it stands today in order to determine whether it successfully serves the ends it purports to, that is, as an instrument of both economic distribution and planning. Such a straight forward analytical study would however be deficient in many respects. It appears that the essential purpose of the law of contract is to secure a solid basis for the ordering of social and economic relationship in any given society. Hence, to serve this end, the law of contract must be sound in its premises, acceptable in its practical consequences and desirable in its objectives. To pass any judgements on the above issues, we must therefore look at the law of contract functionally. How successful has it been? For this purpose, we have to examine the law historically as well. Also, since the law of contract is not merely a physical and psychological reality but is above all a volitional creation of man, we need to examine what forces have contributed to its creation, and also the innumerable innovations that were brought to it through the ages. In this, we need to distinguish between the formal theories of sources of law which serve to rationalize the process of justifying legal decisions, and the historical explanation of the evolution and reception of new legal doctrine. Hence, we shall look not only at the role of precedent and the creative role of judges, but also at the philosophical and intellectual movements which have motivated any innovations.

The argument we shall put forward is that the conception of a contract as merely a bargain in which the minds of the various contracting parties meet is an inadequate theory of contract,

especially when applied to Cameroon. Contract, viewed in this light, usually regresses into a shorter and shorter calculation of advantage, motivated by the hostile and naked self-interest of the dominant party to the bargain. On the contrary, contract must be looked at within the wider context of contract as a relationship among the various market participants. The need therefore arises for the precise definition of the parameters of this relationship. Only when this is done can a bargain cease to assume its entirely adversarial character and be seen as reflecting within it the general consensus of the economic opinion within the society, especially with regards to such matters as the price and other contractual terms.

Such a conception of contract is especially necessary in a society where the classical notion of freedom of contract is a travesty because of the social and economic disparities that exist among the economic participants. It is '*a fortiori*' necessary because of the fact that the standardized contract has, instead of the contract by negotiation, become the norm. With this holistic perspective of the law of contract, the question whether or not contracts have to be regulated becomes otiose because as in other forms of relationships (like labour), the need for regulation is apparent.

If throughout most of the discussion, specific reference is not made to Cameroon, it is for the obvious reason that the law of contracts in Cameroon is derived from the common law of England and French civil law. Secondly, to be sure, the level of industrialization and commercialization is less than in England; however,

the same patterns exist there that exist in England. Also because of the greater disparities pointed out above the need for a new theory of contract in Cameroon is even more acute.

We shall proceed to examine the law of contract in two sections. First, we shall look at the history of the law of contract which we shall divide in two parts: the formative period of the law of contract which ends at about the beginning of the nineteenth century, and the second part which commences from the early part of the nineteenth century. Then in the second part, we shall examine the concept of contract as a relation instead of a mere transaction.

Section I: The Formative Period of the Law of Contract:

(a) Early Contract Law:

The development of the law of contract before 1602 was very much blended with the development of negligence⁽¹⁾. The cases were concerned with positive wrongdoing. There were various kinds of actions that could be brought: action of covenant; action of debt (debt on a contract, debt on an obligation). An important aspect of early contract law was the fact that executory promises could not be enforced since in this case, it was not a question of positive wrongdoing, but of nonfeasance. The assumption here was that a man was not to be held liable for his intentions without an act done since words were not acts. Hence, the action of

1. Baker: Introduction to English Legal History (Butterworths 1971), p. 275.

assumpsit could not be extended. The only cases where a person could be held liable for nonfeasance was where because of his calling or status, for example, an innkeeper, a public duty was imposed upon him to act. The action of assumpsit was also used to cover certain cases of deceit. This could also constitute a public offence, for example, when a lawyer took fees from both parties to a dispute.⁽²⁾

However, towards the end of the sixteenth century, different views were emerging. One view was that there ought to be reciprocity or a quid pro quo of bargains. The second view was that if a party relied on a promise to his detriment, the resulting damage ought to be made good. It should be noted however that it was not the promise *qua* promise that was being enforced, *but the ensuing damage caused*. Another reason why nonfeasance became actionable at common law was to curb the flourishing contractual jurisdiction the Chancellor had been exercising. If, it was reasoned the common law courts did not cover this area, it would have given the Chancellor the right to annex the whole field of commercial law. "[A]ssumpsit did not lie to enforce the covenant, which was not enforceable without speciality, but redressed the injury suffered by acting or reposing in the belief that it would be kept."⁽³⁾

2. Statute of Westminster I (1275) c.29.

3. Baker, p. 280.

Gradually, the action of assumpsit was extended to debt through *indebitatus assumpsit* but there was no certainty in this respect until *Slades Case* in 1602.⁽⁴⁾ In that case, the right to recover a debt through assumpsit was established. That case has generally been held as marking the threshold of contract law since for the first time, the various actions within the spectrum of contract became unified. In spite of this development, there was still no proper theory of contract. As a result of this change in the law, and also as a result of the poor state of the law of evidence, there was the fear of an increased rate of perjury in bringing actions of assumpsit. These developments provided a basis for the rationalization of the doctrine of consideration. As Jeffrey Gilbert explained, oral promises had to be backed up by consideration which rendered such promises enforceable, "otherwise a man might be drawn into an obligation without any real intention by random words and ludicrous expressions, and from thence there would be a manifest inlet to perjury because nothing were more easy than to turn the kindness of expressions into the obligation of a real promise".⁽⁵⁾

A second direct outcome of this situation was the passing of the Statute of Frauds, (1677)⁽⁶⁾. The statute was enacted to make certain kinds of contracts unenforceable unless they were made in writing. Again, these measures were designed to curb fraud and perjury.

It is suggested that from this period onwards, the law of contract did not develop fortuitously, but that its development

4. Slade v Morely (1602) 4 Co. Rep. 92a

5. Of Contracts (c. 1720) Britt Lib vs Hargrave quoted in Baker, 265.

6. Stat 29 Car 11 C3 S54, 17.

was conditioned by the development in other areas such as the law of evidence, the political and intellectual changes which were occurring in the country, as well its general economic and social conditions.

Before we proceed, it is worthwhile remarking that the division of the history of the law of contract into these various stages should by no means convey the impression that they represent clear-cut distinctive phases in the development of contract law. Needless to say, the changes occurred imperceptibly because at no time is it possible to have philosophical or judicial unanimity among the various intellectuals and judges.

(b) The period up to 1800:

Until as late as 1800, the content of the law of contract was very uncertain. Contract law was still subordinated to the law of property as can be seen from Blackstone's Commentaries, Book II, where contract appears as a branch of the law of property. The rules of the law of contract just began to be formulated by Lord Mansfield in the third quarter of the eighteenth century. The only major doctrine that had emerged was that of the doctrine of consideration and even that had not been entirely settled for there were attempts made, especially by Lord Mansfield, to broaden its scope to such an extent that it would have become a concept of more academic than practical relevance.

In 1720, Sir Jeffrey Gilbert explained that the common law, in maintaining the doctrine, was taking a middle course, one between holding men rigidly bound to their promises and enforcing only

those contracts for which there was a "quid pro quo" The only exception to this doctrine was where the parties had reduced their contract to writing under seal for it was thought that it would be downright madness to trifle with the solemnity of law and pretend after the sealing that there was nothing seriously designed.

In *Pillans & Rose v. Van Mierop and Hopkins*,⁽⁷⁾ Lord Mansfield sidestepped the requirements of assumpsit and its cornerstone, the doctrine of consideration, and invoked instead the simple and straightforward principles of consent and fair-dealing of the law merchant. He rationalized his approach in the following terms: "I take it that the ancient notion about the want of consideration was for the sake of evidence only; for when it is reduced into writing, as in covenants, specialties, bonds, and so on, there was no objection to the want of consideration".

Implicit in his approach was the downgrading of the importance of the seal. This did not go down well in the bench as later cases proved. In *Rann v. Hughes*⁽⁸⁾, Lord Mansfield reiterated his view but he was reversed in error by the House of Lords. Their Lordships, in a unanimous decision, held that an action could only be founded on a parol promise if it was supported by consideration. It was held that the difference was not between written and oral contracts but between deeds and parol contracts; hence the doctrine of consideration, the balance wheel of the emerging law of contract lived on.

7. (1765) 3 Burr 1664.

8. (1778) 4 Bro Part Cas 27, 7 Term Rep 350.

The doctrine of 'caveat emptor' - "let the buyer beware", which was to attain its full development in the nineteenth century, had also emerged during this period. A warranty or guarantee was said to be a statement relating to the quantity or quality of the goods sold, made by the seller at the time of the sale. It did not relate to anything in future, but was an assertion of a present fact. Therefore, whenever there was a breach of warranty, remedy lay in an action for deceit and not for a breach of contractual liability. Thus, in cases where no express warranty or guarantee was made, there was generally no remedy if the goods turned out to be of poor quality. The rule 'caveat emptor' was followed, as in *Chandelor v. Lopus*.⁽⁹⁾

Two factors were important in the shaping of the law of contract in the eighteenth century. The first was that the economic system was largely undeveloped and goods were not yet seen as being fungible.⁽¹⁰⁾ Exchange was not yet conceptualized in terms of future monetary return, consequently, expectation damages were not awarded by the eighteenth century courts. This proposition is illustrated by the case of *Furreau v. Thornhill*.⁽¹¹⁾ In that case, a purchaser of a lease sued for failure to deliver because of a defect in title. He sought to recover not merely his deposit but also damages sustained as a result of the loss of the bargain. The court refused to grant him any more than his restitutionary claim and one of the judges said he could not "be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost".

9. (1603) Cro Jac 4, 8 H.L.R. 282

10. M. Horwitz, "History of Contract Law", 87 Harv.L.R. (1974), p.920.

11. 2 Black W. 1079, 96 Eng1 Rep 635 C.P. (1776) quoted in Horwitz, above.

In *Dutch v. Warren*⁽¹²⁾, a buyer brought an action for restitution of money paid on the purchase of stock, the price of which had fallen by the time of delivery. The court held that the case was well brought;"not for the whole money paid, but the damages in not transferring the stock at that time". Although this case has sometimes been cited to support the proposition that expectation damages were recognised in the eighteenth century,⁽¹³⁾ Lord Mansfield in *Moses v. Macferlan*⁽¹⁴⁾ referred to it only to illustrate the equitable nature of the action for money had and received. Cases where executory contracts were enforced without part performance were so infrequent that it took a long time before any precise rules could be developed.

Another characteristic of eighteenth century contract law was Blackstone's division of contracts into express and implied contracts. Express contracts, he thought, consisted of obligations imposed by the courts or by statute. The second category of contracts, in which he included all common counts arose from "natural reason, and the just construction of law"⁽¹⁵⁾. For this category of contracts, he cited Lord Mansfield in *Moses v. Macferlan* where he said "In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money" (page 681, *op.cit.*). There was thus an equitable conception of contract law in the eighteenth century.

12. 1 Strange 406; KB Engl Rep 589, KB (1760)

13. J. Powell, 'Essay Upon the Law of Contracts and Agreements', (1790) 137-38.

14. 2 Burr, 1005, Eng Rep 676, KB (1760)

15. Blackstone, Commentaries, 161, (London 1791.)

We now turn to the second factor which shaped the law of contract in the eighteenth century and that was the economic and philosophical thinking in the eighteenth century. This, we can best do by looking at the ideas of Lord Mansfield whose tenure of the office of Chief Justice of the King's Bench between 1756 and 1788 had a great influence on the law in the eighteenth century. When he took office, according to Lord Campbell,⁽¹⁶⁾ he had "a very low estimate of the Common Law of England which he was to administer".

On the one hand, the foundations of nineteenth century contract law were firmly laid down by Lord Mansfield as he attempted to free the law from pre-commercial forms of actions. He began providing a general theory of contract by abstracting from the various cases aspects common to all agreements and thereby formulating rationalizing principles. On the other hand, his approach was antithetical to the nineteenth century approach for he analysed the law in terms of eighteenth century economic realities. In *Jones v. Randall*,⁽¹⁷⁾ he said: "It would be strange, if, after so large an increase of commerce, art and circumstances accruing, we must go to the time of Richard I to find a case and see what is law". Mansfield's justification of his approach is encapsulated in his criticism of *Shelly's Case*. He said that "if courts of law will adhere to the mere letter of the law, the great men who preside in Chancery will ever devise new ways to creep out the lines of law and temper it

16. The Lives of the Chief Justices of England, vol 3 (New York 1873), p. 229.

17. (1774) Lofft, p. 385 cited by Fifoot, Lord Mansfield (Oxford, Clarendon Press, 1936), p. 227.

with equity",⁽¹⁸⁾ hence, that would "render the lines of property very dubious and uncertain, by a difference in judgements in law and equity". His assimilation of law and equity led him to emphasize the moral obligation in all transactions and thus extended the writ of *assumpsit* to many forms of extortion and unfairness which previously only the Chancery could have handled. In *Smith v. Bromley*,⁽¹⁹⁾ he allowed a woman to recover money she had paid to her bankrupt brother's creditor in the belief that it would secure her brother's discharge.

Mansfield's jurisprudence could be contrasted with that of Adam Smith, his contemporary, who was also to have a great deal of influence in the nineteenth century. Mansfield's method was to apply human reason to the development of functioning institutions, to enable them to cope with the needs of society, a method which appears to be very modern, while Adam Smith pursued the analytical approach, "stressing deductions from observed material quantities and relationships".⁽²⁰⁾

Mansfield was influenced by the Roman legal tradition, especially that of Ciceronian rationalism, the essence of which was that consultation between human beings was the spirit of social progress. Hence Mansfield thought that the legal scholar had a role in generalising and rationalizing commercial usage. Thus, in *Pillans v. van Mierop (op. cit.)*, he had no hesitation in saying that "the law merchant and the law of the land is the

18. Fifoot, *Mansfield*, at pp. 183, 188.

19. (1760) cited in Fifoot, *Mansfield*, p. 118.

20. S. Todd Lowry: "Lord Mansfield and the Law Merchant", *Journal of Econ. Issues* (1973), p. 619.

same thing". The idea of freedom of contract as it existed in the nineteenth century was largely unknown in the eighteenth century and it developed essentially, out of Adam Smith's naturalism and laissez-faire. Smith's naturalism in a nutshell, meant that any intervention in commercial life was thought of as unnatural since "the natural price has the greatest chance to be the actual market price under conditions of a free exchange market and stability of money".⁽²¹⁾

Adam Smith was therefore poles apart from Lord Mansfield since to Smith, any conceived body of mercantilist law, designed to shape commercial life was an unnatural intervention. As it has been pointed out already, this became the fundamental premise of nineteenth century classical law theory.

Section II: The Rise of the Classical Theory of Law.

As already pointed out, Adam Smith's naturalism was the foundation stone of nineteenth century classical thinking in both political economy and jurisprudence. In examining the development of classical law, it is appropriate that we begin with an exposition of Adam Smith's thoughts.

Although he is known primarily as the founder of the school of classical economics and the greatest exponent of laissez-faire, it is worth noting that his approach to political economy was from moral philosophy through jurisprudence.⁽²²⁾ In his idea of the

21. Heinrich A. Rommen: "The Natural Law in the Renaissance Period", Notre Dame Lawyer, vol. 24 (1949), p. 487.

22. C.A. Cooke, "Adam Smith and Jurisprudence", 51 L.Q.R. (1935) 326.

invisible hand, Adam Smith stated that economic motivation is beneficial to society and that this motivation should be utilized by the law subject of course to the "laws of justice".⁽²³⁾ *The Wealth of Nations* is an exposition of the working rules of society according to Adam Smith's view of social purpose and human motives. The essential element of his teaching in this respect was the principle of economic freedom. His naturalism was built on a different premise from that of Ciceronian rationalism in which rational and efficient conduct results from the exercise of human reason. His idea of a rational person (i.e. the economic man), is one who acts on his self-interest to achieve his economic desires. In their relentless fulfilment of their economic desires, they are guided by an invisible hand, which ensures that whilst seeking to promote their self-interest, they incidentally promote the public interest as well although they did not set out to do so.⁽²⁴⁾ This self interest cannot however be pursued unless man possesses a large measure of freedom. This theory rests on the assumption that self interest can only operate beneficially when it is expressed in a free market. His deep conviction about the importance of freedom was such that it became for him, not just an expedient in acquiring other values, but a value or an end in itself. He refers to the right of each person to private property and all its incidents, such as the natural right of men to associate with others on terms agreeable to all of them.

23. Wealth of Nations (Dent 1910) Vol. I, p. 421, Vol. II, p. 154.

24. Wealth of Nations, Vol. I, p. 421.

Smith thought of contract in terms of sales and debts rather than legally enforceable agreements creating future rights.⁽²⁵⁾ He criticized the mercantilist tradition of legislating for prices, standards and constraints in internal as well as external trade since such legislation was not in accordance with his system of natural jurisprudence in which economics must be freed from any constraints and must be left to natural forces of supply and demand. In these circumstances, a natural price would emerge towards which aggregate behaviour would tend to gravitate. Adam Smith's approach appears to ignore the fact that the economic process has to function within legal parameters. Indeed, his attitude to legislation was if anything, negative. His political reforms called for the repeal of existing legislation which interfered with economic freedom. The only necessary legislation was that relating to the security of private property. He only looked at the criminal aspect of justice.

It is well to remember that from Hume⁽²⁶⁾ he drew the idea that justice derives its origin from society's sharing of its limited resources, and applied it to Hutcheson's concept of a co-operative social life. As A.C. Cooke pointed out, "though Adam Smith made much of individual initiative and criticized governmental cramping of it, he attempted to establish a valid critique of law in terms of social and economic movement. This

25. S. Todd Lowry, note 20, supra, p. 615.

26. Hume, Treatise Of Human Nature, Bk III Part II S2.

26b. Cooke, C.A., supra, note 22.

study of phenomena in terms of movement was largely abandoned in the nineteenth century development of both legal and economic theory. Under the influence of Bentham, Austin and Holland set up an abstract analysis of the legal equilibrium of a social system, just as Ricardo, Mill and Jevons propounded an equilibrium analysis of the economic order. In both fields, the analysis was static; it investigated the working of given legal and economic mechanisms. And since for the purpose of deductive theory these mechanisms were separately evolved, a separation of economic and legal analysis came about."

(a) Utilitarianism and Legal Positivism.

Of Bentham, Dicey said in 1905: "He was the first and greatest of legal philosophers".⁽²⁷⁾ In the nineteenth century, utilitarianism had a firm grip over legal scholarship. The principle of utility was to Bentham and the Utilitarians the foundation of both morality and law. "By the principle of utility is meant that principle which approves or disapproves of every action whatsoever according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question; or what is the same thing in other words, to promote or to oppose that happiness".⁽²⁸⁾ Furthermore, to Bentham, "Every law when complete is either of a coercive or uncoercive nature. A coercive law is a

27. Law and Opinion in England. (Macmillan, 1914), p. 134.

28. Introduction to the Principles of Morals and Legislation [ed. Harrison] p. 11.

command. An uncoercive, or rather a discoercive law, is the revocation in whole or in part of a coercive law". From Bentham's formulation of the utility principle and his view about the nature of law, emerged one proposition of great moment, i.e., the proposition that legislation can be used to shape society; and it is in this aspect that he was a law reformer. Bentham was therefore one of the first philosophers to demystify the law.⁽³⁰⁾ To him, the objective of the law was to seek to satisfy in an optimal way the desires of human beings in society, which is another way of saying that the law must conform with utility. Ames could therefore say: "The law is utilitarian. It exists for the realization of the reasonable needs of the community. If the interests of an individual run counter to the chief object of the law, it must be sacrificed."⁽³¹⁾ In determining the utility of the society, Bentham stressed that each member of the community must count equally. "[I]n an arrangement designed to give to all men the greatest possible sum of good, there is no reason why the law should seek to give more to one individual than to another. There are abundance of reasons why it should not, for the advantages acquired on the one side never can be equivalent to the disadvantages felt on the other. The pleasure is exclusively for the party favoured, the pain for all those who do not share in the favour"⁽³²⁾ This point is important in two respects. In the first place, it was an explicit proposition

30. Hart, "Bentham and Demystification of the Law", 36 M.L.R. (1973), p.5.

31. James Barr Ames, "Law and Morals", 22 Harv L. Rev. (1908) 97, 110.

32. Bentham, Theory of Legislation, (Kegan Paul, 1911), p. 97.

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for the first time that each person was to have an equal say in determining utility. Secondly, such a formulation of the principle of utility was bound to be hollow because it did not imply that the law should actively establish any equality since that would be a threat to the institution of private property which to the utilitarians was sacrosanct.

Utilitarians shared a lot with the classical economists since they both believed in individualism both as a value in itself and as a means of social mechanism and also in the idea of freedom of contract as a general principle of law and economics.⁽³³⁾ "No man of ripe years and of sound mind, acting freely, and with his eyes open, ought to be hindered, with a view to his advantage, from making such a bargain in the way of obtaining money as he thinks fit, nor (what is a necessary consequence) anybody hindered from supplying him, upon any terms he thinks proper to accede to".⁽³⁴⁾ The idea of freedom of contract was adopted for two reasons. The first was the idea that individuals knew their interests best. The second reason was rooted in the philosophy that liberty of contract was a natural right, an idea which Bentham got from Grotius. Government's function was to Bentham, to confer that right as well as other natural rights upon individuals. In his essay "On Liberty", J.S. Mill propounded the principle of non-interference in contracts as a utilitarian principle.

33. P.S. Atiyah, The Rise and Fall of Freedom of Contract (Oxford, 1979), p. 324.

34. J. Bentham's Economic Writings, ed. Stark (London, 1952); p. 129.

While this principle might have been an ideal instrument in demolishing the antiquated institutions which stood in the way of progress, it was developed into a creed by utilitarians, particularly Herbert Spencer, and it rapidly became an end in itself. Before examining the main result of this idea of freedom of contract, i.e., the emergence of the will theory of contract and of sanctity of contract, it is worthwhile looking at the incidental effects of this utilitarian position.

With the possible exception of J.S. Mill, the classical economists and the utilitarians paid no attention to the question of distribution of wealth. They assumed that freedom of contract would operate in a system of perfect competition and consequently that it would bring about fair distribution but this assumption proved to be unfounded. They therefore remained blind to inequalities in wealth and bargaining power. By resting freedom of contract on the moral principle of utility, they gave moral sanctity to the existing market prices and, similarly, moral blessing was given to the inequalities.⁽³⁵⁾ They reasoned that any redistribution in the society would disrupt the economy since the expensive products would be bought by fewer people and the level of investment would fall, thus making society poorer. It was therefore contrary to the principle of utility. The overall result was therefore to put people more firmly into their grooves in society. Secondly, the problem of social costs, i.e., the costs imposed on third parties

35. Atiyah, The Rise and Fall of Freedom of Contract, p. 337.

and on society as a result of a contract between two or more parties was largely neglected. It followed that there was no social purpose in the law of contract, outside the promotion of the interests of the parties concerned. The importance of private property and private rights was exaggerated at the expense of the public right.

A further consequence of the utilitarian philosophy was the development of legal positivism by Austin, Holland *et al.* The judge's power to adopt the law to the changing realities was downgraded, particularly in the field of contract where the matter was left to the private legislation of the parties concerned. The premises on which legal principles were founded were no longer examined; conceptions were fixed, social progress became barred by precedents and what Dean Pound characterized as "mechanical jurisprudence was the predominant school of thought in law".⁽³⁶⁾ To this may be added the importance of principles, especially after the translation into English of Pothier's *Traite' des Droits des Obligations*".

Although it is now possible to criticize the utilitarian approach to the law of contract, it must be stressed that the principle of freedom of contract was originally formulated to destroy the antiquated institutions that stifled economic progress. By 1800 as we have pointed out earlier, executory contracts had become enforceable and contracts began to assume a dominant role in the economic system as being instruments for "futures" agreements.⁽³⁷⁾ The utilitarian

36. Roscoe Pound, "Mechanical Jurisprudence", 8 Columbia L. Rev. (1908), p. 605.

37. Morton J. Horwitz: 87 Harv. L. Rev (1974) 117-118.

analysis of law, with its off-spring, legal positivism, were the nineteenth century answers to the problems created by the dynamic and expanding free enterprise economy. It was not fortuitous that Maine's famous dictum about the progression of modern economies from "status to contract" was uttered in 1861. As earlier mentioned, the corollary of the principle of freedom of contract was the "will theory of contract" which in turn shaped the classical paradigm of contract law: rules dealing with offer and acceptance, consideration, the canons of interpretation, mistake, misrepresentation and the sanctity of contract.

(b) The Will Theory of Contract:

A result of the nineteenth century utilitarian philosophy and classical economics was the idea that the free will of the parties to a contract made law for them. The court had no more right to change their agreement than it had to change any other part of the law. Hence, the will of the parties became the source of the mutual rights and duties the contracting parties had with respect to one another. In the words of Morris Cohen, "[a]ccording to the classical view, the law of contracts gives expression to and protects the will of the parties, for the will is something inherently worthy of respect..."⁽³⁸⁾ "Contractualism in the law, that is, the view that in an ideally desirable system of law, all obligations would arise only out of the will of the individual contracting freely, rests

38. Cohen, "The Basis of Contract", 46 Harv L. Rev (1932) 553 at p. 575.

not only on the will theory of contract but also on the political doctrine that all restraint is evil and the government is best which governs least. This in turn is connected with classical economic optimism that there is a sort of pre-established harmony between the good of all and the pursuit by each of his own selfish economic gains".⁽³⁹⁾ The idea of the will of the parties was derived from the historical school of thought of Savigny and was predicated upon the assumption that a person's will had an autonomous power over him.

Quite apart from the psychological question whether or not such a will actually exists, there is the question of how free such a will actually is, a question which we shall turn to later. Rationalizing the enforcement of contracts on the basis that it is the result of the will of the parties, is in itself very dubious for, as Lundstedt points out, even if we admit the false dogma of the freedom of the will as our starting point, such an explanation is no more than an arbitrary declaration, a *petitio principii*. He goes on to say that "[f]or it is obvious that so long as one cannot afford a real explanation of this wonderful effect of the will, one takes for granted the very thing one is supposed to prove, namely, that the will of the parties produces legal effects due to their own capacity. It is obvious that rational people could not direct their wills to the origin of rights and duties, if they did not know that their wills really were able to produce such an effect. If a person holds a gun

39. Cohen, *supra*, p. 558.

in his hand, he cannot wish or intend to shoot another with it if he does not know that it is a shooting weapon, and consequently does not know the connection between the pressure on the trigger and the shot."⁽⁴⁰⁾ He rightly concludes therefore that the will theory of contract explains the basis of contract in a circle. The "Will" nevertheless became the "grundnorm" of all other contract doctrines. In the later part of the nineteenth century and certainly in early part of the twentieth century, the will theory of contract was on the wane and we shall return to this later, but while it was the mainstay of contract theory, it was very influential in shaping classical contract law. For a start, since the will of the parties determined their legal relations, it followed that the law must concern itself only with the actual intentions of the parties, except in so far as there was an illegality. The court was limited to the construction of the wording of the contract.

Secondly, for a contract to come into being, the minds of the parties must "meet" at one instant of time.

Thirdly, since the will of the parties was the only source of any rights and obligations, the law was powerless to fill in any gaps in the contract the parties made.

Finally and most importantly, by assuming that the parties possessed the free will to enter into contracts the fact that there were many social and economic pressures that induced people to enter into contracts, and the fact that some parties had a superior bargaining position vis-a-vis others was shelved.

40. A. Wilhelm Lundstedt. Legal Thinking Revised, (Stockholm, 1956), pp. 241-242.

(c) Nineteenth century innovations which resulted from the "will theory".

(i) Offer and Acceptance:

Until the nineteenth century, proof of the existence of an agreement was by establishing that consideration had been furnished for a promise but early in the nineteenth century, the doctrine of offer and acceptance had been superimposed on the requirement of consideration. Professor Atiyah suggests that offer and acceptance and consideration were all part of "an invisible trinity, facets of one identical notion which is that of bargain".⁽⁴¹⁾ The first case in which the doctrine appeared however was *Adams v. Lindsell*,⁽⁴²⁾ a case of contract by correspondence. At common law, a promise is valid consideration for another made in return. While this did not pose any problems in oral promises, it did pose certain difficulties in contracts by correspondence since both promises could not be made at the same time. In this particular case, the difficulty was overcome by assuming that "the defendants must be considered in law as making during every instant of the time their letter was travelling, the same identical offer to the plaintiffs", a solution borrowed from Pothier's *Treatise on the contract of sale*,⁽⁴³⁾ where he deals with contracts by correspondence: "... in order that consent of the parties might take place ... it is necessary that the will of the party who makes a proposal in writing should continue until his letter reaches the other party, and until the other party declares his acceptance of the

41. Atiyah, "Introduction to the Law of Contract", 3rd ed. (Oxford, Clarendon Press 1981) p. 75.

42. (1818) 1B & Aid 689.

43. Part I S. II art III quoted in Simpson, "Innovation in Nineteenth Century Contract Law". Vol. 91 Law Quarterly Rev. (1975) p. 211.

proposition: The will is presumed to continue if nothing appears to the contrary".

The doctrine of offer and acceptance had to be accompanied by an intention to create legal relations. Both requirements, unknown to pre-nineteenth century contract theory, were predicated on the inarticulate premise that it was the will of the parties that mattered. The prominence of these doctrines was attested in the case of *Carlill v. Carbolic Smoke Ball Co. Ltd.*⁽⁴⁴⁾

(ii) The Doctrine of Mistake:

The question of mistake inevitably arose from the proposition that the wills of the parties had to meet, i.e., that there must be consensus ad idem. Pothier observed that "Error is the greatest defect that can occur in a contract, for agreements can only be formed with the consent of the parties, and there can be no consent when the parties are in error respecting the object of the agreement".⁽⁴⁵⁾

If there was a mistake, there was no consensus and therefore, no contract. The question however was whether a subjective or an objective standard ought to be used in determining the intention of the parties and this is particularly important where an equivocal promise has been made and the parties disagree on its import.

In the celebrated case of *Raffles v. Wichelhaus*,⁽⁴⁶⁾ the

44. [1893] 1Q.B. 265.

45. Note 43 at p. 267.

46. (1864) 2 H & C 906; 83 L.J. Ex 160.

plaintiff sued for failure to accept delivery of goods which were to arrive "ex Peerless" from Bombay. The defendant pleaded that the goods they had intended to accept had to arrive via the Peerless which left Bombay in December. Parol evidence was adduced by the defendants to show that there was a mistake as to which ship was intended. Counsel for the plaintiffs pointed out that it was immaterial by what ship the goods arrived, so long as the ship was called "Peerless", an argument which appeared to make more commercial sense. The court nevertheless thought that so long as there was a mistake, that was an end to the matter; there had been no consensus ad idem, and consequently, no contract. The subjective standard was applied. In *Dickinson v. Dodds*,⁽⁴⁷⁾ not the least of the problems involved was to determine the meaning of "This offer to be left over until Friday, 9 o'clock am, June 12, 1874". The court again, used the subjective standard and held that the offer could be retracted before Friday. Although the subjective standard was applied in England as the above cases have just shown, in America, the courts held that a reasonable expectation, created by an appearance, called for enforcement to make good the expectation. On the continent, the argument was that although the will of the parties was important, it was the declaration of the will that had to be looked at.⁽⁴⁸⁾

47. [1876] 2 Ch. D. 463

48. Roscoe Pound, "The Role of the Will in Law", 68 Harv.L. Rev. 3.

(iii) Consideration:

We saw that towards the end of the eighteenth century, Lord Mansfield attempted to abolish the doctrine of consideration. The changing philosophical basis of the law in the nineteenth century, i.e., the economic doctrine of laissez-faire, utilitarianism and the "will theory of contract", was bound to have a fundamental bearing on the doctrine of consideration "The nineteenth century saw the return to 'the doctrine of the fathers' with the rejection of much that had been accepted in the previous one hundred years, and the blind acceptance of the principles laid down two centuries before."⁽⁴⁹⁾

The eighteenth century notions of moral obligation in contract were discarded in favour of the bargain theory of consideration, that is, the theory that the common law simply gave effect to bargains privately arrived at. In *Currie v. Misa*,⁽⁵⁰⁾ Lush J. said "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given suffered or undertaken by the other". Central to this formulation was the fact that there should be a detriment to the promisee for not any act of benefit to the promisor was valuable consideration in the eyes of the law.⁽⁵¹⁾ In *Shadwell v. Shadwell*,⁽⁵²⁾ however, there was no

49. K.C. Sutton: Consideration Reconsidered (Univ. of Queensland Press, 1974), p. 11.

50. (1875) LR. 10 Ex 162

51. K.C. Sutton, supra. p. 14.

52. [1860] 3 L. T628.

detriment to the promisee but only a benefit to the promisor. The benefit or detriment must have been the result of a bargain. The court did not enquire into the adequacy of consideration since bargains had to be left free. The doctrine of consideration however, became so abstract that it could be used to explain why an offer, albeit expressed in irrevocable terms, could nevertheless be revoked as in *Dickinson v. Dodds*⁽⁵³⁾. As Prof. Gilmore points out, the use of consideration here makes the stipulation that the offer was to be 'left over' entirely irrelevant⁽⁵⁴⁾. Another case which illustrates the meaning consideration assumed in the nineteenth century is *Stilk v. Myrick*.⁽⁵⁵⁾ In that case, two seamen deserted a ship while it was on a voyage at Cronstadt where the ship had made port. The owners then offered to split the deserters' wages to the rest of the crew if they accepted to work the ship back to London. When the crew sued to recover the money, the defendants' case was that there was no consideration for the second contract and the court upheld their contention.

A further consequence of the general acceptance of the will theory was that the courts began to look for and require a contractual relationship called "privity". Since a contract was the result of the wills of the parties, it followed that no third party not involved in the contract could have any rights or obligations from the contract. This position did not of course consider the problem of social costs brought about by contracts between various parties.

53. Note 47, *supra*.

54. Gilmore, *The Death of Contract*, (Columbus, Ohio State Univ. Press, 1974), p. 29.

55. (1809) 170 Eng. Rep. 1168

This classical model of contract, with certain modifications, (for example, equitable estoppel as a result of *Hughes v. Metropolitan Ry.*⁽⁵⁶⁾) lived on to the twentieth century. If it was an ivory tower of abstraction even at its inception, it was more so in the twentieth century when the conditions in industry and the market had drastically altered. The result of these changes in industry and the market, which we shall discuss in the next section, was that the moral idea of respect for the given word, the idea that the free wills of the parties made contracts, dwindled. It will be submitted later, that a different model of contract now ought to be considered.

Section III: The Decline of the Classical Contract Model

We have put forward the view that the classical paradigm of contract was in the nineteenth century, an ivory tower of abstraction and it is even more so today. The question then is, why has that paradigm persisted for so long? The answer maybe lies first of all in the fact that lawyers (court officials, academic and practising lawyers), have found it easier to stretch to new uses the classical model rather than introduce an entirely different model which accords more with the reality of commercial and consumer practices.

Secondly, it is a trite observation that in many respects, some concepts in classical contract law have been modified to such an extent that they can hardly be said to mirror their original formulations.

56. (1877) 2 App. Cas. 439.

From the discussion of the classical model above, we came to the conclusion that it was predicated upon the following ideas:

(i) That the law of contract frees the individual to determine his own norms of contract, i.e., that he is free from society's coercion to choose his options. It is in this respect that Sir Henry Maine said that all movement of progressive societies had been from status to contract;

(ii) That in a situation of perfect competition, neither party to a contract has any power over the other. This meant that a formal equality was attributed to each person in processes of contract (in the formation or performance of a contract, or the resolution of a dispute arising therefrom);

(iii) That the state should not intervene in the bargaining process. It should only provide a framework within which such bargaining could take place, which implies that it should confine itself within the functions of conflict resolution, thereby ensuring voluntariness. This is contrary to the view that the state should use the law as a means of social engineering.

We shall now take each of these perspectives of classical law for what it is worth and see how it stands in present day society. When Sir Henry Maine made his famous dictum that progressive societies moved from status to contract, what he meant was that "the individual is substituted for the family, as the unit for which civil laws take account". "Starting as from one terminus of history, from a condition of society in which all these relations of persons are summed up in the relations of family, we seem to have steadily moved towards a

phase of social order in which all these relations arise from the free agreement of individuals".⁽⁵⁷⁾ Hence, put in its proper context, Maine's dictum was true in the sense that the shackles of servitude had by the middle of the nineteenth century been destroyed, particularly by the process of democratization.

True, the population at large had some power to enter into transactions and relationships which they deemed to be to their advantage; but the question was, what options were open to them? The central problem then becomes one of the constraints (economic and social), that canalize their choices. Indeed, the idea is being canvassed now, that status in this new light now has a role to play in the adjudicatory process of the courts in contract matters.⁽⁵⁸⁾

The second idea which, as we pointed out, is one of the mainstays of classical contract theory is equally untenable. If the facts of the present day economic order bear out anything, it is that, (a) perfect competition is not only a practical impossibility, but also a theoretical impossibility; (b) because of the rise of corporate institutions and the continuation of the existing forms of capitalist property relations in society, there is not, and cannot ever be any form of equality between the contracting parties; (c) that, to attribute any such formal equality is to accentuate the domination of the stronger over the weaker party.

57. Sir Henry Maine, Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas (London, T. Murray, 1901) pp. 168-170.

58. Childrens and Spitz, "Status in the Law of Contract" 47 New York Un. L. Rev. (1972), p.1.

By 1900, the economic life of Great Britain was dominated by corporate institutions. These institutions had the advantage of mobilizing large sums of money to carry out projects which until then could not be carried out owing to the limited bankroll the small firms possessed. There was an unprecedented increase in the size and concentration of these institutions and some of them attained the proportions of monopolies.⁽⁵⁹⁾ Firms which were not large enough to become monopolies combined to form Trade Associations, the primary purpose of which was to maintain the status quo.

It came to be recognized that it was impossible even to attribute a theoretical equality to the parties. It was also impossible to have anything resembling perfect competition when the market could effectively be dominated by large, powerful monopolies.

Another important consequence was that the structures of these large corporations meant that their management effectively became separated from the ownership. Hence, the managers, whose primary duty as stipulated by law was to the owners (shareholders), could break their contracts at will, if they thought it was in the interest of the shareholders for them to do so. This was facilitated because in the first place they incurred no personal liability and secondly because there was a decline of the awarding of expectation damages about this time, they could do so at very small costs to the corporations. They could therefore, whenever possible, evade or disobey laws which impinged on their interests. As Warren S. Gramm put it, "There is no natural tendency for pure competition. Rational,

59. Atiyah, The Rise and Fall of Freedom of Contract. 596-601.

private self-interest militates for market control as well as for control of government to the extent possible".⁽⁶⁰⁾

Where the ethos is concern for gain, any concern for the public interest recedes. Corporate institutions are not simply economic units; they are indeed political units because it is in their interest to be so. Thus, in the absence of any real constraints, they will be able to tilt rules and laws substantially to their advantage. This, will be examined when standardized contracts will be looked at in the next chapter. "It is naive to expect otherwise. Why would an organization that is actively seeking profits within the rules of the game not seek further profits by altering the rules of the game as well - especially when its structure makes it likely that it would succeed?"⁽⁶¹⁾ In view of the above observations, it can be said that there can hardly ever be a situation of perfect competition. Even in a situation where the parties start off on approximately equal terms, such a situation can only be very transient for as soon as any of the parties improves on his position, he can then use his improved position as a lever, to extract more favourable terms for himself and to change the institutional framework to his advantage whenever possible.

Professor Atiyah suggests that the growth of these mammoth commercial institutions is attributable to the laissez-faire creed since it required that corporations be given the right to

60. "Industrial Capitalism and the Breakdown of the Liberal Rule of Law". *Journal of Economic Issues*, Vol. VII, (1973), p. 589.

61. Victor Goldberg: "Institutional Change and the Quasi Invisible Hand", 17 *Journal of Law and Economics* (1974) R 461 at p. 479.

merge if it was in their interest to do so. The consequences for consumers were largely disregarded.⁽⁶²⁾ All this means that the expansion of the corporate state contained the seeds of the destruction of the classical contract paradigm, since the assumptions on which it was based were shown to be untrue.

The third point raised is that of state intervention in the bargaining process. This idea is at the very root of classical contract theory. This point of view presupposes that the state is a neutral, value-free framework whose duty is to ensure laws are abided by. Such is the ideal laissez-faire state. From what we have discussed so far, it can be concluded that inaction by the state is in some measure tantamount to intervention albeit of a negative variety, since it is an approval of the status quo. If large corporations can use superior bargaining power in getting for themselves advantageous terms in contracts, particularly those in standard form, when it is acknowledged that the same institutions can use their power to change the institutional framework to their advantage, the state which is the decision making structure, by standing aloof, is in actual fact approving the ensuing consequences. Seidman argues that it is not only empirically impossible but also theoretically impossible for the state to be impartial for "[t]he rules that define any decision making process necessarily limit the range of potential inputs, conversion processes, and feedback functions. These rules, to that degree, predetermine outputs, that is, the decisions. The state, perceived as a framework for the resolution of conflict, is a decision-making

62. Atiyah, footnote no. 33, supra at p. 617.

structure. No more than can any other decision-making structure can it be neutral. If the decision-making structure cannot be neutral, its output cannot be value-neutral. The laws of property and contract which are required by the ideal type model of the market-economy therefore cannot be neutral, for they are the products of a decision-making structure."⁽⁶³⁾

That fact was recognized by the end of the nineteenth century by people like Bernard Shaw, T.H. Green et al.⁽⁶⁴⁾ Freedom to them, assumed a more positive role. It was no longer confined to traditional freedoms like freedom to contract, but also meant that there should be freedom to achieve self-fulfilment.

Today, the law of contract is replete with statutory provisions which limit the individual's liberty to contract. These statutory provisions have not only benefited consumers, but they have also been of benefit to the business concerns who have sought the assistance of the legislature where the market has failed. The funeral oration of laissez-faire was given by J.M. Keynes who in 1926, wrote: "It is not true that individuals possess a prescriptive 'natural liberty' in their economic activities. There is no 'compact' conferring perpetual rights on those who have or who acquire. The world is not so governed above that private and social interests always coincide. It is not so managed here below that in practice they always coincide. It is not a correct deduction from the Principles of Economics that enlightened self interest always operates in the public interest. Nor is it true that self interest generally is enlightened; more often individuals

63. Seidman, R.B. "Contract Law, the Free Market, and State Intervention; A Jurisprudential Perspective". Vol. 7, Journal of Economic Issues (1973) p. 553 of 558.

64. G.B. Shaw: "The Road to Equality; Liberal Legislation and Freedom of Contract in the Works of T.H. Green"; ed. Nettleship (Longmans, 1885-8).

acting separately to promote their own ends are too ignorant or too weak to attain even these. Experience does not show that individuals, when they make up a social unit are always less clear sighted than when they act separately".⁽⁶⁵⁾ The idea that economies should be managed rather than left to gain their own equilibrium began to gain ground.

Today, the emergence of the state as a major source of revenue and wealth is nearly universal. Even in countries which are largely based on the market economy, the state usually has the largest stake in the economy. It is difficult to see any retreat from the present situation since it would mean that the giant corporations would simply replace the state in this connection. There has been a gradual withering away of the strict distinction between the public and the private sectors.⁽⁶⁶⁾

These developments have led many scholars to talk of the death of contract.⁽⁶⁷⁾ The main theme of these scholars is to stress the fact of the irrelevance of traditional contract theory. Professor Kessler showed with percipience that the classical theory was out of touch with the reality of consumer contracts most of which are now in standard form.⁽⁶⁸⁾ Professor Macaulay has also demonstrated the irrelevance of classical contract theory on commercial contracts, since the role of contract in the classical

65. The End of Laissez-Faire, (London, 1926).

66. Reich, "The New Property", 73 Yale L.J. 733.

67. Grant Gilmore, The Death of Contract [1974]; "Friedman and Macaulay: "Contract Law and Contract Teaching", [1967] Wisc L. Rev. p. 805.

68. Kessler, "Contracts of Adhesion", 43 Colum L. Rev. [1943] 629.

theory is very limited.⁽⁶⁹⁾ What is being advocated is a more empirical version of contract theory which reflects the manner in which present day contracts are made and enforced. To be sure, situations do arise in which the classical model is appropriate. The point being made however is that such contracts are no longer typical of the average contract today. This proposition, which has been gaining ground recently, is that the reason why the classical model has failed is partly due to the fact that so far, the classical model has viewed contracts only as transactions and that their relational aspect have largely been ignored.

Before proceeding, it is necessary to relate the above discussion to Cameroon. In the first place, it is the classical paradigm which still applies (formally), and this is done without most of the legislative constraints that have been applied in England and France. Secondly, the sectors of the economy that matter are dominated by relatively large corporations, public and private. This situation, coupled with the high level of consumer ignorance and economic disparity among the economic participants, makes the need for a new perspective to contract law even more strongly felt.

69. Macaulay: "Non-Contractual Relations in Business", 28 Am. Socio. Rev. (1963) 55.

(a) Relational and Transactional Contract:

In the classical contract model, a contract is viewed essentially as a discrete transaction. This perspective of contract has its roots in classical economics. The view was that the various parties to a contract could by and large ascertain their long term interests and could as such, in a contract, bind themselves in future by the exchange of promises. Free choice is of the essence in such a situation. It is however, an empirical fact that situations will arise where the actor's short-term perceived interest will conflict with his long-term interest which he may or may not have perceived. This is the reason why many contracts are broken. It appears therefore that the question of free choice and rationality on which the classical economists laid so much emphasis was ill-conceived. The attempt to explain all social and economic processes solely "in terms of a self-generating system of atomic or individual relations based on subjective rationality" is pervasive in the entire history of contract law.⁽⁷⁰⁾ It is indeed clear that not only is a great deal of contract breaking tolerated but that it is also expected for promises are not absolute. Abiding by one's promises (contracts), serves a social and economic function. Where it is therefore not beneficial to the promisor and where the onerous consequences of performing the contract outweigh the consequences of breaking it, the former course will frequently be chosen. Professor Atiyah also points out that in

70. S. Todd Lowry, "Bargain and Contract Theory", supra, footnote 20, at p. 5.

modern times there has been a relative decline in free choice. Hence, lawyers have more readily jettisoned the idea of individual rationality on which classical law is based.⁽⁷¹⁾

In both legal and economic analysis, the faith in the consistent cogency of the rationality of the individual gave rise, in economics, to what Milton Friedman has termed "positive economics",⁽⁷²⁾ a parallel of positivism in law. In law, this gave rise to the definition of contract simply as "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognises as a duty".⁽⁷³⁾

Recently, many scholars have been wondering whether contract so defined represents what actually transpires in the real world. Is a contract simply a transaction or is it something more; a part of an ongoing relationship between parties, the past, present and future of which one can in no way distinguish clearly? In his book, *The Death of Contract*, Professor Gilmore contends that it is no longer possible to deduce a coherent body of principles from the numerous transactions in dealing with modern exchange problems. Morton Howitz also contends that the primal roots of contract were neglected by the early writers on contract theory.⁽⁷⁴⁾ Their

71. P.S. Atiyah, Rise and Fall of Freedom of Contract, p. 726.

72. A Coddington, "Positive Economics"; 115 *Canadian J. of Economics* (1972) 1-15.

73. Restatement of Contracts, (1932), Paragraph 1.

74. Morton Howitz, "The Historical Foundations of Modern Contract Law", 87 *Harv Law Rev.* (1974) 917-56.

fundamental concern was to reduce contract law into a coherent body of principles, derived from a common core of rational, consistent transactional patterns which took place in the economy. Hence, they treated the exchange of promises essentially as sales. The "contract is dead school" has therefore highlighted many issues which have resulted in the irrelevance of contract theory. This does not suggest to us however that contract has lost its role in present day society. It springs from the fact that anything that was inconsistent with the classical contract paradigm was eliminated from the sphere of contract. Hence, many scholars, awoken to this fact, have sought to put things right. This classical point of view presumes that no duties exist between the parties prior to the agreement and any duties that exist thereafter are determined at the formation stage. In Ian Macneil's words, there is supposed to be a "sharp in by clear agreement, sharp out by clear performance".⁽⁷⁵⁾

While this may be true of some contracts, there are many sorts of contracts to which such a description would be most inappropriate. Labour contracts for example, are entirely outside the ambit of such a restricted view of contracts. The specific contracts which we intend to examine, viz. contracts for the sale of agricultural products, credit and hire-purchase contracts, contracts for the supply of services etc., cannot also be brought within such a simplistic view of contract. We are in these cases, concerned

75. Ian Macneil, "The Many Futures of Contract", Vol. 47 Southern California Law Rev. (1974) 691 at p. 738.

with far more complex contracts. It is also recognized now that in most contracts, certain contractual duties may arise even before the formation of the contract, such as a duty to bargain in good faith.

That economic relations are no longer confined to "transaction", is evidenced by the emergence of status in present day economic relations, monopolies are being dealt with quite differently from other enterprises; it is also recognized now that certain consumers require the law's protection more than others. Indeed, the very nature of the main economic unit - the modern corporation - epitomizes this attitude in its very structure: an ongoing relation of many people, which changes with time and circumstances. In modern contracts, the tendency is for future risks to be adjusted either by virtue of some clause in the contract requiring the modification of contractual terms, or by some quasi administrative process, rather than the strict adherence to the letter of the contract.

Contracting parties find it to their advantage to be flexible especially in relation to the contract price and they most often leave the price, particularly in supply contracts, to be set by agreement from time to time.⁽⁷⁶⁾

It might be contended that the view of contract as a relation does not add anything new since it does not redefine the traditional contract doctrines such as consideration, offer and acceptance, the distinction between contractual terms etc. It is submitted however

76. Lon Fuller and Robert Braucher, Basic Contract Law (West Publishing Co. 1964), pp. 77-78.

that there is a fundamental difference in regarding a contract as a single transaction where two or more parties are involved from that of viewing a contract as a relation among the various parties. In the one case, the contractual process is necessarily an adversary type in which parties simply seek to further their self-interest. Contract here usually regresses into a shorter and shorter calculation of advantage, motivated by the hostile self-interest of the dominant party to the bargain. In the other case however, the contractual process is not necessarily adversarial. It is part and parcel of an existing relationship which is not limited by its formative stage but goes on into the future. Thus, the features of this relation must be determined, and its parameters defined. It is only within such a framework that a social purpose can be instilled into the contractual process as well as into the enforcement of contracts. Secondly, if it is acknowledged that most contracts would fit into this framework, then the stigma attached to the interference with freedom and sanctity of contracts would be eroded since it would become the function of the law to establish the framework for all contractual relations.

More importantly, this perspective of contract is not merely conceptual, but it corresponds more to what actually takes place in society. We shall vindicate the validity of the above proposition by looking at Ian Macneil's treatment of relational contract in the article cited above.

Before proceeding, it is however necessary to consider another perspective of contract put forward by Professor Leff.⁽⁷⁷⁾ In his

77. Arthur Leff, "Contract as a Thing", 19 American Univ. L. Rev. (1970) 131.

analysis which relates exclusively to consumer contracts, and standard form contracts in particular, he suggests that in such contracts what one is buying is not merely the article or service, but the whole range of the contract process, which includes bargained and non-bargained processes of which the most tangible and mutable is the article or service. He suggests therefore that the whole bundle which results should not be called a contract, but a "thing" since the actual subject of the transaction has not been bargained for at all. He says that a "thing" presents itself as what it is, to take it or leave it, while a contract is the end product of a bargaining process. He proceeds by stating that if such contracts are properly regarded as "things", the question whether or not they should be regulated does not arise for inasmuch as regulation of other things are common (regulation may relate to hygienic or safety standards), regulation of consumer contracts should not be questioned since they are also "things". Leff's view of whether a contract is a transaction or relation is not clearly spelt out however. While he states that a contract is a deal as opposed to a more long term relationship, he says on the other hand that a contract presupposes "not only a deal, but dealing".⁽⁷⁸⁾

It is submitted that while Leff's analysis is useful in connection with standard form contracts, it is more limited in its scope than the concept of a relational contract discussed by Ian Macneil, which puts most, if not all contracts in their true perspective, as aspects of an ongoing relationship among economic actors.

78. Leff, p. 138.

(b) The Characteristics of Relational Contract

In discussing relational contract (i.e. contract as a relation), we shall follow closely the treatment given to it by Ian Macneil. The classical model of contract looked at a contract exclusively as a transaction. In his words, "Their great vehicle was the abstract but brilliant conception of consent: that to which consent was given is included, everything else is excluded; consent once given, remains immutable".⁽⁷⁹⁾

The Primal Roots of Contract:

The reason why "contract" has been seen exclusively as a "transaction" is that the primal roots of contract and its social matrix have largely been ignored. He lists exchange as one of the basic roots of contract and he characterizes it as a pre-condition for specialization.

While it is not certain that exchange as we know it was essential to specialization in primitive societies, it is nevertheless true that exchange and specialization were indispensable to the development of contract.

The second primal root is the existence of a sense of choice. People must have the capacity to choose from a range of behaviours, otherwise, it would be impossible to talk of contract. To be sure, because of physiological determinism and social pressure, there is nothing like absolute choice. It is however rare to find a situation where all choice is taken away completely from the individual. In

79. Macneil, p. 756.

every contract situation, there is always an element of pressure on the individual since the existence of an exchange itself constitutes a pressure for every person would rather have anything free rather than to have to give something up for it.

For this reason therefore, even in cases where a party had very little choice, as is the case in some adhesion contracts, provided there is a "voluntary" exchange a contract situation would be deemed to exist. So long as there was any alternative open to the party, it would pose considerable problems trying to exclude some exchange from the ambit of contract, since the question will be where to draw a line between what is a contract and what is not. How much choice would be necessary for a contract to exist? Furthermore, we saw earlier, one of the major characteristics of modern society is the dwindling of choice given to the individual in economic matters. The trend is towards collectivism, especially in production. This is reflected by the growth of standardised products and standard form contracts. Transactions tend to be more individualized while relations are more collectivist. Hence, to the extent that collectivism necessarily tends to limit choice, it follows that the lesser the choice, the more relational contracts are.

The third primary root of contract according to Macneil is the conscious awareness of the past, present and the future. He says that until man or his forebears developed this perception of the continuum of past, present and future, it was impossible consciously to project exchange into the future".⁽⁸⁰⁾ The view that contract

80. Macneil, p. 710.

is a discrete transaction based on the rationality of the individual does not explain how the threshold of good faith necessary for the continuation in future of the contractual relationship originated. A relation cannot logically be derived from subjective rationality but must be derived from a comprehensive social rationality. One view of this threshold is that habit and custom which were followed consistently by large groups of people became crystallised, thus forming the baseline or threshold of this relation.⁽⁸¹⁾ The problem for the jurist or economist is therefore to analyse the various sorts of components comprehended by contract.

(c) Distinctions between transactional and relational contract:

The purpose of distinguishing between transactional and relational contract is to show that the relational threshold is a precondition of for any contract. It is difficult to find a situation where a contract is entirely transactional or relational. Two examples may be given to illustrate the two poles of contract. Macneil gives the illustration of the purchase of petrol at a service station along a motorway.⁽⁸²⁾ The petrol purchase is more akin to the transactional pattern in the following respects: firstly, there might have been no precedent dealing between the parties and there might be no future dealing between them. The purchase takes only a few minutes, without any personal relationship between the parties. For the relational pattern, an employment situation could be used as an example. If X decides to join an engineering firm, although

81. S. Todd Lowry, "Bargain and Contract Theory", 10 Journal of Econ. Issues (1976), p. 6.

82. Macneil, p. 720.

there is a point in time when the contract may be said to have come into being, there might have been previous dealing between the parties involved. There must have been several interviews, probably a probationary period etc. The duration of the contract might be uncertain and although X will certainly be concerned about the salary he is offered, long term prospects would most likely be of greater importance to him. There is a personal relationship between the parties which goes on for a long time.

In the first case, although the purchase appears to be entirely transactional, it is by no means so. There might have been some "brand" relationship created by earlier purchases or advertising. Also, there might be some future relation in the form of credit arrangements. Sometimes, there is even a human relationship such as when preference is given to certain customers, particularly at periods when there are shortages.

In the second example, the exchange is both economic and social. Hence, even in these extreme examples, it can be seen that even a simple purchase which appears to be a mere transaction has an element of "relation" about it.

In the transactional case, the subjects of the exchange must be easily monetized. This is so whether the transaction is to take place in the present or in the future. In the relational case, all aspects of the relation cannot be easily monetized.

The second major difference relates to the source of socio-economic support the contracts have. Macneil puts forward the view that the socio-economic support for transactions lies outside the exchange transaction; for example, an exchange transaction can only occur if property rights receive

socio-economic support.⁽⁸³⁾ Although a relation necessarily enjoys external socio-economic support, it also generates its own internal support. The more parties are involved in the relation, the stronger this support is, "The internal support which a relation establishes but which is lacking in a pure transaction is without question one of the most important distinctions between exchange transactions and exchange relations. It is a distinction affecting their very aspect, from day to day casual operations to major planning to various disasters to social reinforcement and control."⁽⁸⁴⁾

Another important distinction affects the duration, commencement and termination of the contact between the parties. In a purely transactional situation, the duration is short and performance of the contract is instantaneous. However, there may be an extension of time, especially when future delivery is concerned or where credit arrangements are made. This may therefore cause a transaction to become more relational. In a purely relational situation, the duration of contract between the parties may be infinite although there is a point in time at which it may be said to have commenced.

From the above discussion, it is clear that the dominant mode of economic organization is the relation and not the discrete transaction. Production has always been accomplished by relational means and "consumption" has already become relational in many respects.

83. Macneil, p. 746

84. Macneil, p. 748.

Businesses are now very conscious of these limitations of the discrete transactions and are more concerned with long term relations to the extent that they are cavalier about detailing strict rights and duties.⁽⁸⁵⁾

(d) Contract and Planning:

The role of contract is not merely to transfer anticipated risks as the classical contract theory would have us believe, but also to build economic relations in an imperfectly competitive market. In this way, economic planning can be developed to embrace complex business and consumer relations. It is concerned with planning and organizing future long term relations. Thus, the actual market exchange, while remaining important, becomes incidental or ancillary to the planning process.

Since most contracts are neither pure transactions nor entirely relational, contract planning will therefore assume aspects of both. Planning in a relational context cannot be absolutely immutable since the relation grows and changes with time and circumstances.⁽⁸⁶⁾ This is so because it is difficult to specify every aspect of the contract. Moreover, as we pointed out, a relation has an internal capacity for growth. As a result, there was a development of relational means in which both "promise" and the market played important roles. On the production side, the

85. Macaulay, footnote no. 69, supra, pp. 55-67.

86. Macneil, p. 762.

upshot was the growth of the modern corporation while on the consumer side the emergence of standardized products and standard form contracts.

As it can be realised, people are more willing to adhere to already existing relations than to enter into entirely new relations. The mutual planning of the original relation is therefore of utmost importance for it must reflect the fairness of the entire relation.

In the case of a consumer contract, who is therefore to participate in the process of mutual planning? If the planning is entirely carried out unilaterally by one party, the arrangement does not become relational. Hence, it will be submitted a body which has the interests of the consumers at heart, should engage in this process of mutual planning with the producer. Although the entry of new members into the existing relation would be adhesive, i.e., without any bargaining, the original operation which provided the standard would however be relational. The essence of the planning is to make a relation less conflict laden and to provide the possibility of dealing with conflicts through a variety of ways.

The planning of a relation also effects the participants' views about it which inevitably have a bearing on his actual behaviour vis-à-vis the relation.⁽⁸⁷⁾ In a purely transactional situation, the individuals' subjective view of it is entirely motivated by self-interest and nothing else. The contract must be performed and forgotten as quickly as possible. In a relation, however, which is not discrete, (in a macro sense), the parties know that

87. Macneil, 794.

they shall continue to deal with each other in future. There is the consciousness that as circumstances change, there will be a need for new planning in order to meet the emerging conflicts.

CONCLUSION:

This chapter has been attempting to look at contract historically and analytically, to ascertain whether it has truly served the purpose it was designed to serve. The main argument that has been put forward, is that the classical model of contract has been from its inception an ivory tower of abstraction and that today, it has very little relevance to what actually takes place in the field of contracts. It has been suggested that one of the reasons why this was and is still so is that a contract has been viewed simply as a discrete atomized transaction. The concept of an exchange has therefore been put in its true context: the relation. Transactions are increasingly taking place within a relational framework because transactions alone cannot cope with the planning needs of an increasingly complex socio-economic system.

This perspective of contract therefore brings most of the different sorts of contracts within the general rubric of contract. It provides a solution for the "contract is dead school." The law of contract would therefore encompass all contractual transactions which take place within the framework of contractual relations. Macneil posits broad principles which may be deduced from all these contracts as follows "(1) reciprocity; (2) role effectuation; (3) limited freedom of exercise of choice; (4) effectuation of planning; and (5) harmonizing of contracts with their internal

and external social matrices."⁽⁸⁸⁾

As was mentioned earlier, this perspective of contract does not do away with traditional contract doctrines which were developed with the view that all contracts are transactions. Those contracts which were inconsistent with this perspective of contract were simply left outside the parameters of the general law of contract. Even so, it was applied to cases where it was most inappropriate. To the extent that some contracts still reflect the purely transactional pattern, the classical model with its doctrines still serve a useful purpose. Such cases are however increasingly rare since most transactions are now taking place in relational frameworks. Furthermore, the model does not induce the legislator to consider matters worth his attention. To conclude, we shall quote two passages which summarize relational contract and the importance of planning. Kohler states: "Thus, it is the function of the law of obligations to smooth away inequalities and chance, and thereby make it possible for the values that are inherent in humanity to become effective in their proper proportions. In this way, it liberates development and relieves it from the hazards of time. A great variety of values lie in the future, and for the time being, do not exist for the present ... And, in this contingency, it is the province of the law of obligations to draw the future into the present."⁽⁸⁹⁾

88. Macneil, p. 809.

89. Kohler, cited in Macneil, p. 801.

Todd Lowry also states that: "Relational contract is best seen as an expression of the specialized structuring of relations or private economic planning by participants in an economic continuum, Commitments between businesses are planning and organizing operations which should be viewed in terms of their contribution to social ends, which may include the protection of a zone of arbitrary choice and initiative. Where corporate purposes conflict with widely accepted social ends, the latter unquestionably will take precedence."⁽⁹⁰⁾ Here he appears to be dealing only with business relations but in the light of the above discussion, the same could be said of consumer relations.

90. S. Todd Lowry, Bargain and Contract Theory, 10 Journal of Econ Issues, 1976 p. 18.

CHAPTER THREE:

A COMPARATIVE STUDY OF STANDARDIZED CONTRACTS

The thrust of the last chapter was to show that the classical conception of contract has been exploded and that it has become more relational than transactional. This is reflected in the medium through which this relation occurs. No longer is a contract essentially negotiated between specific individuals. On the contrary, the paradigm of contract is (since the beginning of the twentieth century, in the industrialised countries) the standardized contract.

Indeed such has been the rapidity of this change that Slawson, writing in the United States of America in 1975, estimated that standardized contracts account for about ninety-nine per cent of all negotiated transactions.⁽¹⁾ While the same can hardly be said of Cameroon, there is no doubt, as will be revealed when an examination of standardized contracts in Cameroon will be carried out, that standardized contracts fulfil an important role, not least because the most important consumer contracts, as well as contracts for the sale of agricultural products are all standardized.

This chapter seeks to do two things. First of all it attempts to elucidate the origins and causes of this standardization process; secondly, it seeks to delve into the ways and means by which French and English courts have accommodated standardized contracts.

1. Slawson, "Standard Form Contracts and the Democratic Control of Law Making Power", 84 Harv. L. Rev. (1975), p. 529.

Section I: Origins and Causes of the Standardization of Contracts

The first study of standardized contracts was carried out at the turn of the twentieth century by a French jurist, Raymond Saleilles, who in a study of part of the German Civil Code, wrote in 1901: "Doubtless, there are contracts and contracts, and we are really far from that unity of contractual type assumed by the law. Eventually the law must, indeed, yield to the shading and differences that have emerged from social relations. There are pretended contracts that have only the name, the juridical construction of which remains yet to be made. For these, in any event, the rules of individual interpretation should undergo important modifications, if only that one might call them, for a lack of a better term, contracts of adhesion, those in which a single will is exclusively predominant, acting as a unilateral will which dictates its law no longer to an individual, but to an indeterminate collectivity and which in advance undertakes unilaterally, subject to the adhesion of those who wish to accept the law of the contract and to take advantage of the engagements imposed on themselves."⁽²⁾

Karl Llewelyn in his characteristic manner, put the emerging problem of standardized contracts squarely into perspective when he wrote, in reviewing Pranznitz's pioneer work on the subject,⁽³⁾ that: "Pranznitz is concerned with a problem which has for some time now been alive in our law, and which is on the increase, but which has not yet made its way into familiarity."

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2. Saleilles, "De la Declaration de la Volonte" (1901) cited in Kahn-Freund, A Source-book On French Law, 2nd ed. (Oxford, Clarendon Press, 1979), p. 110.
 3. L. Prauznitz, The Standardization of Commercial Contracts in English and Continental Law (London, Sweet and Maxwell, 1937).

"It is briefly put thus: when a contract ceases to be a matter of dicker, bargain by bargain, and item by item and becomes in any field or any outfit's business or any trade's practice a matter of mass production of bargains, with the background (apart from price, quality and the like) filled in not by the general law but by standard clauses and terms, prepared often by one of the parties only - then what? One "what" is clear: the presuppositions of our general law no longer maintain in such a situation. Those presuppositions can be stated as follows:

(1) The general law is adequately specialized, and is detailed and balanced to fill in with moderate adequacy any gaps which the parties leave open in their bargaining. (2) Any particular or specialized terms the parties are interested in they will bargain out. (3) Almost any particular clause included in a deal presents the parties' joint judgement as to what they want; and this alone is ground enough for letting it, for the deal in hand, displace and replace the general law. But when contracts are produced by the printing press, with the fountain pen used not for recording thought but for authentication, the adequacy of the general law for filling gaps in the conscious bargain is flatly negatived, in the view of the parties preparing and ordering the form pads. And, commonly, that party is in the good part right: specialization of rule is then needed. And contracts which incorporate by reference the full "rules" of some association stand in this on like footing. In neither case, is it to be remembered, are the individual variations from the general law bargained about. The contract is a block-contract,

for one side (or both) to take or leave".⁽⁴⁾

Hence, with the exception of commercial contracts between businessmen, in the great majority of standardized contracts, no modifications are envisaged and the "servient party" is compelled to take or leave the contract proffered by the "dominant party"⁽⁵⁾ as it stands.

While the imposition of terms by one contracting party on the other remains the quintessence of all standardized contracts, the forms they take differ widely. Some are simply the result of the crystallization of long-standing commercial practices in a given industry. Contracts of marine insurance and charter parties are outstanding examples of this type of standardized contracts. The advantage of using such contracts lies in the fact that because they have been in use for a long time, standard interpretations of their clauses have been given by the courts, thereby precluding them from the uncertainty in judicial construction which has plagued many other types of contracts. Nowadays however, the elaboration of such contracts has been taken over by trade associations whose astuteness in protecting their members is beyond any question. They have however been met by legislative control over such contracts as shall be seen later.

4. Llewelyn, Book Review, 52 Harv. L. Rev. (1939) pp. 700-701.

5. The terms "Servient and dominant" parties were used by Austin Wright, "Opposition of the Law to Business Usages", 26 Columbia L. Rev. (1926) 917.

A second category of standardized contracts comprises those which can properly be called "adhesion contracts" in which the offeree has no option but to enter into a contract with the offeror on the latter's terms. This is often the case where the good or service in question is so essential that the offeree cannot do without it and where the offeror in question is a monopoly or quasi-monopoly. Contracts made between users, and electricity and water authorities, and railway companies fall in this category. One commentator has called such contracts "compulsory contracts".⁽⁶⁾ Because these corporations are under a public duty to deal with anybody requiring their services it is impossible for them to operate without the use of standardized contracts.

A third category of standardized contracts fall within the ambit of what Josserand has termed "contractual dirigism".⁽⁷⁾ In this case, certain specified contracts, or contract terms are prescribed and others proscribed by legislation. This type of contract occurs more in France and other continental European countries than in the United Kingdom. Persons who wish to carry out a particular form of activity are compelled to enter into certain contracts by law. A typical example of this type of contract is the third party accident liability insurance contract which must be entered into as a matter of law by anybody wishing to own or drive a car. The protection of the public dictates that legal prescription must displace private

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6. Lenhoff, "The Scope of Compulsory Contracts Proper", 43 Columbia L. Rev. (1943) at 586.
 7. Wilson, "Freedom of Contract and Adhesion Contracts", 14 I.C.L.Q. (1965) 172 at 176.

negotiation between parties, because there is an acknowledgement that private negotiation is insufficient to guarantee the public interest. Although such contracts could be wholly regulated by legislation, usually however, legislation only prescribes part of the terms and the rest is up to the dominant party to determine.

Finally, there are standardized contracts which do not belong to any of the above categories. They are entirely put forward by individual firms - monopolies, wholesalers, retailers, etc., - big or small, to which consumers in particular simply adhere. Such contracts incorporate the great majority of everyday transactions. They involve contracts for the sale of goods, hire-purchase contracts, service contracts, credit contracts. It is with respect to such contracts that this thesis is primarily concerned, especially because they make up the bulk of standardized contracts in Cameroon. It is only very recently (and only in Western European and North American countries) that such contracts have come under legislative control.⁽⁸⁾ It is therefore in such contracts that one finds the majority of unconscionable clauses. Clauses contained in this type (as well as other types) of standardized contract include exclusion and limiting clauses; clauses relevant to quantities, clauses determining the contract price and the mode of payment; penalty and forfeiture clauses; all clauses spelling out technical details where necessary.

8. Early legislation such as the Sale of Goods Act, 1893, although applicable to standardized contracts for the sale of goods, was nevertheless not designed for such contracts.

Standardized contracts are more often than not written. In the industrialized countries, they are invariably written. In the less developed countries such as Cameroon, there is less adherence to "form". Hence there are many types of contracts which are standardized in the sense that a particular enterprise deals widely on definite and ascertainable terms, known to the contracting parties, without having those terms in writing. While this appears to be inconsistent with the meaning "standardized contracts" (although not yet a term of art) has assumed,⁽⁹⁾ it is dictated by social realities such as illiteracy. In the sale of agricultural produce such oral standardized contracts are typical. This obviously presents difficulties inasmuch as it is more difficult to prove in terms of an orally made agreement than those of a written one. Indeed it is evident that having things in writing may avoid disputes and litigation.

The fact that most standardized contracts are written does not however automatically shelve the question of proving the terms of the contract for quite often, the terms of the contract are found in more than one document and the question becomes one of determining which of the documents formed part of the contract.

The main impetus for the standardization of contracts has been economic. Since contract is the instrument through which the processes of economic decision making and commercial exchange are carried out,

9. The term "standardized contract" does not appear as a term of art in any of the recognized law dictionaries although it has been in use since the early part of this century.

the radical transformation of the economies of the Western European and North American countries by the turn of the twentieth century was bound to induce similar changes in the nature of contract. As Lenhoff put it, "In the advanced industrial society, the economic apparatus is no longer focused on the particular tastes and particular desires of individuals, but is based on mass production and mass distribution... This ... has by necessity become more and more standardized; and this standardization has its counterpart in standardized forms for dealing with the customers."⁽¹⁰⁾

The growth of industrial capitalism was therefore the source of the standardization of contracts. By giving rise to industrial concentration (vertical concentration), it created immense economic disparities among economic participants. The upshot of this was the creation of an acute disequilibrium in bargaining power between the firm and the individual. The former could therefore dictate his terms to the latter who could no longer protect his interests. Standardized contracts therefore helped to found what Kessler has termed "a new feudal order."⁽¹¹⁾ Standardized contracts became the only real link between the firm and its clients, i.e., the public and they also provided the means of reducing waste and increasing efficiency in the distribution process.⁽¹²⁾

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10. Lenhoff, "Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law". 36 Tulane L. Rev. (1962) 481.
 11. Kessler, "Contract of Adhesion, Some Thoughts About Freedom of Contract". 43 Columbia L. Rev. (1943) 629 at 640.
 12. Kirsh, Trade Associations in Law. (New York, 1938)

It thus became possible for firms to delegate to a team of experts the task of drafting standardized contracts applicable to whoever dealt with them. Naturally the experts' primary concern was to protect their employers as well as they could and as far as the law allowed them. The introduction of new products which could cause harm to consumers, and the extension of tortious liability to manufacturers as a result of the House of Lord's decision in *Donoghue v. Stevenson*,⁽¹³⁾ meant that in order to avoid liability, firms had to incorporate exclusion and limiting terms which were all-embracing.

Furthermore the spectacular rise in the demand for luxury goods in the developed countries since the second world war has in turn led to the increased reliance on department stores rather than on small retailers. This factor, together with the growth of consumer credit accentuated this standardization process.

Finally, in Europe, the advent of the European Economic Community and increased international trade meant that uniform contracts had to be developed on the international level. This constituted an added factor to the standardization of contracts.⁽¹⁴⁾

The above conditions exist in Cameroon, albeit to a lesser degree. Since independence, the trend in the consumption of luxury goods has been upwards, patterned on that of France in particular, at any rate in the cities.

13. [1932] A.C. 562.

14. Benjamin, "E.C.E. General Conditions of Sales and Standard Forms", *Journal of Business Law* (1961) 113.

From the point of view of the business community, it is difficult to over-emphasize the importance of standardized contracts. Industry-wide standardized contracts drafted by trade associations can be used to stifle competition among the participants in the industry. This is not uncommon in the insurance industry, where in spite of the fact that there may be many firms operating, a person seeking insurance cover will nevertheless be faced with identical terms. Secondly, standardized contracts are the most effective tools possessed by firms in eliminating, whenever possible, market risks inherent in the production, distribution and consumption of their products. Because contracts are often directed towards the future, they are never free of uncertainties.⁽¹⁵⁾ These contingencies may therefore be provided for in the firm's standard contract. As an instrument of economic planning, standardized contracts are invaluable.

The same may apply to litigation. A decision given in connection with a particular type of standardized contract may serve as a test case, thus avoiding numerous other actions to be brought on similar issues. Because of the lack of consistency in the manner the courts have treated most cases on standardized contracts, this positive aspect has not unfortunately been vindicated.

15. Cohen, "The Basis of Contract", 46 Harv. L. Rev. (1933) 553 at 583.

A brief history of standardized contracts:

The earliest standardized contracts were made in the later part of the sixteenth century in connection with marine insurance.⁽¹⁶⁾ Two centuries later, they were mainly used by common carriers. Standardized contracts made by the latter are important for two reasons. First of all, they were widely used, thus affecting a great many people; secondly they presented the type of problems which are at the core of standardized contracts generally, i.e., the problems of exclusion and limiting terms. The position of common carriers at common law was analogous to that of inn-keepers. Because they exercised a public service, their rights and liabilities were determined by the common law instead of being left to the parties, for reasons of public policy.⁽¹⁷⁾ Their liability for the goods or persons they carried was two-fold: they were liable as bailees for the goods they carried, on the one hand, and, on the other, they were liable as carriers for the safety of the persons they carried. The only instances when they were absolved from liability was when the act resulting in damage was from (a) an act of God; (b) an act of the Queen's enemies; (c) the fault of the consignor or (d) an inherent vice in the goods themselves.⁽¹⁸⁾

With increased mobility and trade in England in the eighteenth century, the liability that became imposed on carriers was described by Lord Ellenborough as of "ruinous extent."⁽¹⁹⁾ Carriers therefore

16. Adams, note 19, *infra*. at p. 138.

17. Halsbury's Laws of England, 4th ed. (1973) Para. 302.

18. Halsbury's Laws of England, Para. 333 and 344.

19. Leeson v Holt [1816] 1 Stark 186, quoted in Adams, "The Standardization of Commercial Contracts or the Contractualization of Standard Forms, 7 Anglo-Am. L. Rev. (1978), 140.

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started issuing special acceptances in order to limit their liability under the contract. This was done by declining to carry certain goods except on a special acceptance in which liability for loss or damage to the goods was excluded. In *Bodenham v. Bennett*,⁽²⁰⁾ Wood, B. held that unless the words of the special acceptance were sufficiently compelling, the carrier's liability "qua" bailee was not negated, but that in any event, his liability as an insurer was thereby excluded.

In *Nicholson v. William*,⁽²¹⁾ Lord Ellenborough said: "We cannot do other than to sustain such a right (i.e. to make a special acceptance) however liable to abuse and productive of inconvenience it may be; leaving to the legislator if it shall think fit to apply such remedy hereafter as the evil may require". However, the courts had already begun by this time to require reasonable notice of the terms of the contract to be given to the other party to the contract.⁽²²⁾

The public disquiet that followed the widespread use of these special acceptances brought about the passing of the Carrier's Notices and Carrier's Act 1830. The Act sought to alleviate the burden on carriers in respect of this liability imposed on them when the parcel carried was valued at more than £10. The Act did not however succeed in precluding the

20. (1917) 4 Price 31, cited in Adams, supra, at p. 141.

21. (1804) 5 Edst 507, cited in Adams, p. 141.

22. *Clarke v. Gray*, (1802) 4 Esq. 17, cited in Adams, see note 19, at p. 140.

making of special contracts because carriers began printing their contract terms on the back of their tickets. Because the terms written on tickets were not deemed to be public notices, they did not therefore constitute special contracts, and were therefore not covered by the 1830 Act.

A typical carrier's ticket providing that: "This ticket is used subject to the regulations and those conditions stated in the Company's timetables and bills" was held to constitute a valid contract.⁽²³⁾ Contrary to the view they took before the passing of the Carrier's Act, 1830, faced with the new standardized contracts, printed on receipts, the courts no longer imposed the requirement of notice after the passing of the Act (at any rate, not until *Parker v. S.E. Ry.*⁽²⁴⁾). Lord Cockburn's decision in *Zunc v. S.E. Ry.*⁽²⁵⁾ epitomizes the attitude taken by the courts. He said at p. 544: "However harsh it may appear in practice to hold a man liable by the terms and conditions which may be inserted in some small print upon the ticket, which he only gets at the last moment after he has paid his money, and when nine times out of ten he is hustled out of the place at which he stands to get his ticket by the next comer - however hard it may appear that a man shall be bound by conditions which he receives in such a manner, and moreover when he believes that he has made a contract binding upon a company to take him,

23. *Le Blanche v. London and North Western Ry. Co.* [1876] 1 C.P.D. 228.

24. (1877) 2 C.P.D. 416

25. (1869) L.R. 4Q.B. 539.

subject to the ordinary conditions of the general law, to the place he desires to be conveyed still we are bound on the authorities to hold that when a man takes a ticket with conditions on it he must be presumed to know the contents of it, and must be bound by them".

It is difficult to explain this complacent attitude of the courts towards these standardized contracts except perhaps on the ground that during this period, the laissez-faire doctrine of freedom of contract was at its peak. Indeed such was the complacency that the terms of a contract couched in the following terms were held enforceable:⁽²⁶⁾ "This ticket is issued subject to the owner's undertaking to bear all the injury by conveyance and other contingencies; and the owner is required to see to the efficiency of the carriage, before he allows his horses or live-stock to be placed therein, the charge being for the use of the railway, carriages and locomotive power only, and the company will not be responsible for any defects in their carriages or trucks, unless complaint be made at the time of booking, or before the same leave the station; nor for any damage however caused, to horses, cattle, or livestock of any description; travelling upon the railway or in their vehicles". It surely requires an over-stretching of one's imagination to think of any exclusion clause more sweeping than this. That did not unfortunately influence the court. Basically, as will be seen in the next section, this attitude taken by the courts persisted well into the twentieth century (with certain modifications).

26. Austin v. Manchester, Sheffield and Lincolnshire Ry. (1850) 10 C.B. 453.

The effect of standardized contracts has been discussed by Lord Denning in his book, "The Road to Justice",⁽²⁷⁾ where he describes the sequel to the Court of Appeal decision in *Adler v. Dickson*.⁽²⁸⁾ In that case, the plaintiff was injured when she was mounting the gangway of a ship at a port of call. The ticket which had been issued to her contained an exemption clause which stipulated that the plaintiff was sailing entirely at her own risk and that the company, its servants and any persons directly or indirectly in the employment or service of the company were exempted from any liability, however arising. The plaintiff brought an action against the master and boatswain of the ship and the Court of Appeal gave judgement in her favour, holding that the contract did not deprive her of the right to sue the defendants in tort. Denning L.J. for his part, went further to hold that such an exemption clause required the assent, whether express or tacit, of the plaintiff, which she did not in this case give.

Furious at this decision, the steamship companies and other carriers added to all their tickets, a printed slip designed to absolve the master and crew from any liability however arising. Ignoring the problem of privity that might be raised here for a moment, Lord Denning pointed out the action of the companies in modifying their standard contract forms was comparable to Parliament passing a "Shipowner's Servants Indemnity Bill". This telling effect of standardized contracts has led some commentators to ask whether they should indeed be considered as contracts after

27. Denning, "The Road to Justice" (Stevens & Sons, 1955), p.93

28. [1955] 1 Q.B. 158.

all. (29)

The next section shall delve into the ways in which the English and French courts have dealt with the problems raised by standardized contracts.

29. Leff, "Contract as a Thing", 19 American University L. Rev. (1970), p. 131.

SECTION II: English and French Judicial Treatment of Standardized Contracts.

In the first chapter, the point was made that the law of contract in Cameroon is drawn from English and French law with very few local modifications. To this extent, it is requisite therefore that the French and the English judicial treatment of standardized contracts be examined. There have been in recent years, important legislative innovations in this area of the law, both in England and France. This section will not concern itself with these legislative innovations which will be dealt with by a later chapter. The innovations in question are the Unfair Contract Terms Act, 1977 of the United Kingdom, and the French Law No. 78-22 of the 10th of January 1978.

In comparing the judicial treatment of standardized contracts in English and French law, it is imperative to preface any discussion with a short account of the methodological differences that exist between the two systems. With a few exceptions, the rules governing the interpretation of standardized contracts in English law have been elaborated by the courts as will be seen.⁽¹⁾ In France, article 5 of the Civil Code specifically states that: "Judges are forbidden to pronounce decisions by way of general and regulative disposition on causes which have been submitted to them".⁽²⁾ Only the legislative body has such a right. Because the phenomenon of standardized contracts is posterior to the

1. For example, the Hire-Purchase Act, 1965; the Supply of Goods (Implied Terms Act) 1973; and the Unfair Contract Terms Act, 1977.

2. Translation by Crabb, J.H. "The French Civil Code" (New Jersey, 1977).

elaboration of the Civil Code, there are no explicit provisions in it designed to deal with problems that have arisen in connection with such contracts. To be sure, many of its provisions have been amended since 1804. However, the French judges have succeeded in extrapolating from many of the unchanged provisions in order to accommodate standardized contracts. This has been done essentially by techniques of judicial interpretation not dissimilar to those utilised by English judges. It is also relevant to note that article 4 of the Code states that: "The judge who refuses to judge, on pretext of silence, obscurity or insufficiency of the law, may be prosecuted as guilty of a denial of justice."

Because there was, until fairly recently, a dearth of legislation to deal with standardized contracts in France, the great majority of the guiding principles of law in this connexion are derived from case-law. This is a manifestation of the much favoured fiction of French law that "there is always an applicable rule of law i.e., "loi".⁽³⁾ In certain respects, case-law, when it has become consistent, i.e., "jurisprudence constante", has achieved a force nearly equivalent to that of law, i.e. "loi". Indeed, Francois Geny, writing in 1909⁽⁴⁾ said that confronted with the realities of silence or insufficiency of the law (i.e. "loi"), judicial precedent has what he called "le voir prétorien", by which he meant that by making up for these deficiencies, the judges are in a manner of speaking, creating law.

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3. Ripert, Les Forces Créatrices du Droit, (L.G.D.J. Paris, 1955) No. 158.
 4. Geny, F. Méthode d'Interprétation et Sources du Droit Privé Positif, vol. 2. (L.G.D.J. Paris, 1919) No. 146.

An attempt will be made to differentiate the methods by which standardized contracts are generally controlled or interpreted. There is one general characteristic of these methods which must be pointed out forthwith. They are nearly all, in varying degrees what Karl Llewelyn described as "covert tools".⁽⁵⁾ Underlying them is the assumption that standardized contracts are like other types of contracts and ought to be treated as such: while on the other hand, their often glaring unfairness is recognised but not overtly dealt with. The wide gamut of "tools" that have been used are examined below.

The many features of standardized contracts have been narrowed to four which represent the major problem areas. These are the problems related to the incorporation of terms into contracts; the control over exemption and limitation clauses; the problem of exemption clauses and third parties, and finally the problem of penalties and forfeiture clauses.

A: Incorporation into Contracts

The first question the courts often ask themselves when faced with a standardized contract is whether the clause in issue (where one of the parties relies on an exemption or limitation clause for example), formed an integral part of the contract.

This question often arises in two contexts. First of all, the clause may have been written in a document such as a receipt or notice which is not a contractual document. Secondly the clause

5. Llewelyn, K. "What Price Contract - An Essay In Perspective", 40 Yale L.J. (1931) 704 at p.

may have been written in a contractual document. The question then becomes one of determining whether the document formed the whole or only part of the contract. The latter case is characteristic of commercial agreements⁽⁶⁾ while the former are characteristic of consumer contracts and have sometimes been called "ticket cases".⁽⁷⁾

In the "ticket cases", there is no doubt that a contract has been concluded between the parties; there is doubt however as to whether one of the parties had knowledge of the terms put forward by the other party. Such terms are often buried among others in printed receipts, invoices or tickets.

I. In English Law:

The determination of this issue in English law has turned upon whether sufficient notice as to the existence of the terms has been given by the party relying on the clause to the other party since the decision in *Parker v. The South Eastern Railway Co.*⁽⁸⁾

The facts of this case, which are indeed a perennial occurrence, were as follows: The plaintiff deposited a bag in the cloak-room of the defendants' railway station. He paid 2d, and received a ticket. On one side of the ticket, a date and number were written, so also were the words: "see back". On the back of the ticket, several clauses were printed, one of which stipulated that "the company will not be responsible for any package exceeding the value

6. There is a related problem in connection with commercial contracts called the "Battle of Forms", where the parties exchange their respective standard contract forms and each tries to assume that his own form governs the transaction. Swan and Reiter, *Contracts: Cases, Notes and Materials*, (Butterworths, Toronto 1978) 3-89.

7. Atiyah, P.S. *The Law of Contract*, 3rd ed. (Clarendon Press, Oxford 1981) p. 157.

8. (1877), 2C.P.D. 416, C.A.

of £10", the plaintiff did not read that clause. When he presented his ticket to claim his bag the same day, it could not be found. He brought an action claiming £24.10s, before Pollock B. The defendants pleaded that their acceptance of the goods for bailment was solely on the condition that their liability would not in any event be more than £10 and for support, they relied on the aforementioned term in the ticket they issued. The plaintiff admitted that he knew on receiving the ticket that it contained writing on it but contended that he thought it was merely a receipt issued for the money he paid. In the course of the trial, the judge directed the jury as follows: (1) Did the plaintiff read or was he aware of the special condition upon which the bag was deposited? (2) Was the Plaintiff, under the circumstances under any obligation to read or make himself aware of the condition? The jury answered both questions in the negative.

The Court of Appeal allowed the defendants' appeal on the ground of misdirection and the case was sent back for a re-trial.

Mellish L.J., in his judgement, which has become the "*locus classicus*" on this subject, stated the law as follows:⁽⁹⁾

"I am of opinion, therefore, that the proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing on it, was,

9. At page 423.

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in the opinion of the jury, reasonable notice that the writing contained conditions." He further went on to say: "the plaintiff was certainly under no obligation to read the ticket, but was entitled to leave it unread if he pleased, as the question does not appear to me to direct the attention of the jury to the real question, namely whether the railway company did what was reasonably necessary to give the plaintiff notice of the condition". This formulation of the law has not gone uncriticized. One commentator thinks that it does not adequately reflect the importance given by modern contract law to the doctrine of constructive notice and calls for the law in this connection to be restated.⁽¹⁰⁾

Although Mellish L.J.'s formulation has undergone "a certain amount of embellishment and gloss...", in attempts to narrow the scope of the principles laid down, with the course of time, it has been approved by the House of Lords and applied in numerous cases.⁽¹²⁾

The question whether reasonable notice as to the existence of any particular clause has been given depends on a number of factors.⁽¹³⁾

(a) The nature of the document:

In *Parker v. The South Eastern Railway Co.*, Mellish L.J. pointed out that in certain cases, it is reasonable to expect a person who receives a paper containing writing to treat it merely as an acknowledgement of the payment of money. He gave an example of a person who, driving through a turnpike, receives

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10. Malcolm Clarke, "Notice of Contractual Terms", 35 Cambridge Law Journal (1976), p. 51 at p. 52.
 11. Atiyah, *supra*. note (7) at p. 157.
 12. See: *Spencer v. Rowntree* [1894] A.C. 217, 219 (H.L.)
McCutcheon v. David MacBrayne Ltd [1964] 4W.L.R. 125
Hood v. Anchor Line Ltd. [1918] A.C. 837.
 13. See generally, Treitel, *The Law of Contract*, 5th Edn. (London, Stevens & Sons 1979), Chapter 7.

a ticket. Such a person might rightly assume that the ticket was meant to be produced at some other turnpike as evidence that he had already paid,⁽¹⁴⁾ without more.

Hence, the circumstances in which the document is given might convert it to mere evidence of some act, other than notice of the contractual terms. This view has been especially applied in *Chapelton v. Barry U.D.C.*⁽¹⁵⁾ In that case, deck chairs were stacked by a notice requesting persons who wished to hire them to obtain tickets from an attendant. The plaintiff took two chairs and obtained two tickets which he did not read. One of the chairs was defective and it collapsed, injuring the plaintiff. The ticket contained a provision stipulating that the hirers would not be responsible for any accident which arose from the use of the chair. The Court of Appeal held that the ticket was no more than a receipt for money paid.

(b) Time of notice:

One of the factors which led to the decision in *Chapelton v. Barry U.D.C.* (above) was the fact that tickets were often issued only after the contract had been entered into. In *Olley v. Marlborough Court Ltd.*⁽¹⁶⁾ the plaintiff and her husband booked a room in a hotel and paid the charges in advance. When they entered the room reserved for them, there was a notice on a wall stating that "The proprietors

14. *Supra*, note 8, at page 422.

15. [1940] 1 K.B. 532

16. [1949] 1 K.B., 532.

will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody". The Court of Appeal held that the plaintiff, whose furs were stolen from the room during her absence, was not bound by the excluding clause because the notice had been given to her only after the contract had been made, and therefore too late.

In such cases therefore, it is a matter of determining when, in accordance with the principles of offer and acceptance, a contract is made.⁽¹⁷⁾

This point is further dealt with by a more recent case, *Hollingworth v. Southern Ferries Ltd. (The Eagle)*.⁽¹⁸⁾ The plaintiff, through a friend of hers, contracted to travel on the defendants' boat from Southampton to Lisbon. While on one of the ship's restaurants, the plaintiff fell and injured herself due to the defendant's negligence. In an action against them, the ship owners denied liability, relying on a clause on the ticket they issued which excluded such liability, a clause which, the ship-owners argued, formed an integral part of the contract. It was established however that the plaintiff's friend who booked the trip, collected the tickets on a later day, i.e. the tickets were delivered only after the contract had been made. *Olley v. Marlborough Court Ltd* was applied and the defendant's contention did not stand. The defendant's argument that the plaintiff's friend must in any event have known of the exclusion clause from

17. Clarke, "Notice of Contractual Terms, vol.35 Cambridge Law Journal (1976) at p. 65.

18. [1977] 2 Lloyd's Rep. 70.

a brochure he had read prior to entering into the contract was not upheld. The court felt that fresh notice had to be given since the notice from the brochure had spent itself. It is contended that⁽¹⁹⁾ because the rule is that notice of the term be in the party's mind at the time he makes the contract, that the notice was given earlier should in principle be immaterial. "*The Eagle*"⁽²⁰⁾ is demonstrative of the fact that English courts are quite astute in holding that a term was not brought to the knowledge of the other party before the contract was entered into.

It is arguable that a person who receives a ticket posterior to the conclusion of the contract and does not object to any of the terms impliedly accepts a variation of the contract. Such an argument is however unsound for two reasons. First of all there would be no consideration for this "new contract". Secondly, in *Burnett v. Westminster Bank Ltd.*,⁽²¹⁾ Mocatta J. held that in a continuing contractual relationship, any variation of the terms of the contract must be specifically brought to the knowledge of the other party to the contract. Accordingly, notice of a term inserted on the front cover of a chequebook by a bank was insufficient to vary the original contract between the other contracting party and the bank. This leads on to the third factor which the courts take into consideration in determining whether notice of terms has been properly given:

19. Clarke, Note, (1978) 37.C.L.J., p. 21 at p. 23.

(c) Degree of notice:

This depends on the steps the party relying on the term has taken to give notice thereof, and also on the nature of the term itself. He must do what is reasonably sufficient in bringing notice of the term to the other party. In doing this, he is not obliged to know of the particular circumstances of the other party.

In *Thompson v. London, Midland and Scottish Ry. Co.*,⁽²²⁾ the Court of Appeal held that as long as what was done was sufficient to bring notice of the terms to the knowledge of the members of the public the fact that the plaintiff had a particular disability, i.e. illiteracy, was of no moment in deciding the issue. Mellish L.J. put it thus in *Parker v. The South Eastern Railway Co.*: "a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness".⁽²³⁾

In *Geier v. Kujawa*,⁽²⁴⁾ the plaintiff, a passenger in the defendant's car could not read English, a fact which the defendant was aware of. It was held that the plaintiff was not bound by a notice in English displayed in the car. The decision does not however derogate from the principles laid down in *Thompson v. London, Midland and Scottish Ry.*, since the decision turned on the particular facts of the case.

22. [1930] 1 K.B. 41

23. It is submitted that the question whether a person can read a clause should be distinguished from the question whether he can understand it. More often than not, such clauses are deliberately couched so as to be unintelligible even to people of average understanding.

24. [1970] 1 Lloyd's Rep. 364.

In a recent case, *Smith v. South Wales Switchgear*,⁽²⁵⁾ a contractual document provided that the company's general conditions were available on request. The plaintiff had been issued with the 1969 copy of the general conditions. The House of Lords held that an incorporation by reference to the conditions of the 1970 copy was valid because had plaintiff requested a copy, one would have been duly sent to him.

The nature of the clause in question may also affect the degree of notice required. In *J. Spurling Ltd. v. Bradshaw*,⁽²⁶⁾ Denning L.J. as he then was said: "Some clauses I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held sufficient". On account of the facts in this case however, he thought that such notice was not required. This view has been applied in *Thornton v. Shoe Lane Parking*.⁽²⁷⁾ The plaintiff in this case parked his car in the defendant's multi-storey automatic car-park and got a ticket from a machine. Outside the car-park there was a notice listing the parking charges, at the bottom of which was a clause stating that all cars were parked at owners' risks. While leaving the car-park, there was an accident in which the plaintiff was severely injured. In a personal injury action, the defendants relied on their conditions of contract which excluded liability for "... injury to the customer or any other person occurring when

25. [1978] 1 All E.R. 18

26. [1956] 1 W.L.R. 461 at p. 466

27. [1971] 1 All E.R. 686.

the customer's motor vehicle is in the Parking Building howsoever that ... injury shall be caused...". This clause was among many others displayed in a panel on a pillar opposite the ticket machine. The ticket issued to the plaintiff contained a clause stating that: "This ticket is issued subject to the conditions of issue as displayed on the premises."

Lord Denning held first of all that the clause was not incorporated in the contract because the plaintiff could only have read it after the contract had been made. He went further to say that even if he was wrong on that score, the defendant cannot in any event rely on the clause because it was so wide and so destructive of rights that it had to be specifically drawn to the attention of the other contracting party. Megaw L.J., while agreeing with Lord Denning stressed on his part the unusualness of that clause - unusual because it extended the exemption to personal injury as well as to damage or loss of the car or its contents. It has been suggested that "unable to declare a clause void because it is unreasonable, the courts are now declaring it unincorporated because it is unusual."⁽²⁸⁾ In order to ascertain whether a particular clause is unusual, reference has to be made to similar contracts to see whether they contain like conditions. This, the court refrained from doing. The court was actually judging the reasonableness of the clause instead, although even Lord Denning was timorous enough to say: "I do not pause to enquire whether

28. Clarke, (1976) Cambridge Law Journal, note 17, supra at p. 70.

the exempting condition is void for unreasonableness.⁽²⁹⁾ In *Parker v. S.E. Ry.* Bramwell L.J. clearly states that in his judgement, exclusion clauses have to be reasonable. He said: "I think there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read".⁽³⁰⁾ Unfortunately, his judgement has been largely neglected as far as this area of the law is concerned.

There are however certain instances in which the court does not require notice of terms to be given as outlined above. This involves instances which are so recurrent that a party is presumed to know that certain conditions attach to certain contracts. In *Parker v. The South Eastern Ry.*, no such knowledge was presumed with respect to contracts for the deposit of luggage in cloak-rooms at railway stations. Seventy years later in *Alexander v. Railway Executive*,⁽³¹⁾ Devlin J. noted that "most people nowadays know that railway companies have conditions subject to which they take articles into their cloak-rooms". One can say the same about special contracts entered into between professionals. They would be presumed to be seized of knowledge of whatever terms are common in such contracts. This is presumably what Mellish L.J. was referring to in Parker's case when he said, "in the greater majority of cases persons shipping goods do know that the bill of lading contains the terms of the contract of carriage; and the shipowner, or the master delivering the bill of lading, is entitled to assume that the person

29. [1971] 1 All E.R. 686 at p. 690.

30. *Parker v. The South Eastern Railway Co.* note 8 supra at p.428.

31. [1951] 2 K.B. 882 at p. 886.

shipping goods has that knowledge."⁽³²⁾

British Crane Hire Corp. Ltd. v. Ipswich Plant Hire Ltd.⁽³³⁾

illustrates this point. The defendants contracted by telephone to hire a drag line crane from the plaintiffs. The plaintiffs later sent a confirmation note which contained printed conditions. The crane got stuck in mud, and a dispute arose as to who was to bear the costs of removing it from the mud. This turned on the question whether the plaintiff's conditions on the confirmation note were incorporated into the contract, thereby making the defendant liable for the costs. The Court of Appeal gave judgement for the plaintiff. Lord Denning said at p. 310: "Each was a firm of plant hirers who hired out plant. The defendants themselves knew that firms in the plant hiring trade always imposed conditions in regard to the hiring of plant; and that their conditions were on much the same lines... In these circumstances, I think the conditions on the form should be regarded as incorporated into the contract".

(d) Previous course of dealing:

Where there has been a previous course of dealing between the parties to a contract, the party proffering an exclusion or other term may assume that the other is aware of the terms. If therefore on any given occasion the terms are not given to the other party,

32. *Parker v. The South Eastern Railway Co.*, (1877) 2 C.P.D. 416 at p. 422. Although most laymen would not have such knowledge, in truth, most if not all shipping business is handled by professional shippers and it is their business to have such knowledge.

33. [1975] Q.B. 303; this case may be contrasted with *Hollier v. Rambler Motors (A.M.C) Ltd.* [1972] 1 All E.R. 399.

they may nonetheless apply. Course of dealing must be distinguished from trade usage. In the former, the parties may not consider themselves bound by such a term at all times while in the latter, they must.⁽³⁴⁾ It suffices that there must be a regularity of dealings between the parties for a course of dealing to be implied. The degree of regularity required has however not been decided on by the courts.

In *Henry Kendall & Sons v. William Lillioo & Sons*,⁽³⁵⁾ a contract for the sale of poultry feeding stuffs was made and a confirmation note was sent the next day which included exemption clauses. The parties had dealt with each other for about three years, entering into three or four contracts monthly. The House of Lords held that there was a sufficient course of dealing to warrant the incorporation of the exemption clauses. In *J. Spurling v. Bradshaw*,⁽³⁶⁾ "the defendants had received many landing accounts before" and that was, in the view of the court, equivalent to a course of dealing.

In *McCutcheon v. David MacBrayne*,⁽³⁷⁾ Lord Pearson said, "It is the consistency of a course of conduct which gives rise to the implication that in similar circumstances a similar contractual result will follow. When a contract is not consistent, there is no reason why it should produce an invariable contractual result."

34. See Hoggett, "Changing A Bargain by Confirming It" 33 M.L.R. (1970) 518 at 520.

35. [1968] 2 All E.R. 444 (House of Lords)

36. [1956] 2 All E.R., 121 at 125.

37. [1964] 1 W.L.R. 125 at 134.

In the instant case, the plaintiff had sometimes signed the defendant's risk note; at other times, he did not. It was therefore held that there was no course of dealing.

The same reasoning underlies Edmund Davies L.J.'s judgement in *Mendelsohn v. Normand Ltd.*⁽³⁸⁾ In that case, the plaintiff parked his car in the defendant's garage. He had done so about three or four times previously. On this occasion, he was told by the defendant's attendant not to lock his car. The valuables in the car were stolen. Lord Denning treated the case as one of fundamental breach of contract. Edmund Davies L.J. thought that there was inconsistency in the course of dealing which precluded the exclusion clause from being incorporated into the contract. Because the attendant had changed the course of dealing the clause was not incorporated.

(e) Written Contracts:

In *Parker v. The South Eastern Railway Co.*, Mellish L.J.⁽³⁹⁾ said: "In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know the contents".

This dictum was applied in *L'Estrange v. Graucob Ltd.*⁽⁴⁰⁾ The proprietress of a cafe bought an automatic cigarette vending machine.

38. [1970] 1 Q.B. 177

39. (1877) 2 C.P.D. 416 at p. 421

40. [1934] 1 K.B. 394.

The sales form which she signed without reading contained an exemption clause written in very small print. The machine was defective and she brought an action for breach of the implied warranty of fitness for purpose. The Court of Appeal held that she was bound by the clause. Southern L.J. said: "When a document containing contractual terms is signed, then, in the absence of fraud, or I will add, misrepresentation, the party signing is bound, as it is wholly immaterial whether he has read the document or not. Maugham L.J. said the same thing but added that there was another defence, i.e. the plea of 'non est factum'.⁽⁴¹⁾

This rule has come under heavy criticism and has even been dubbed as "a menace to the community".⁽⁴²⁾ It is thought that a different result could have been reached on the authority of *Hitchman v. Avery*.⁽⁴³⁾ In that case, H, a dairyman, persuaded his roundsman to sign a document containing a covenant forbidding him from setting up a rival business whenever he left H's service. He knew A could not read. Wright J., held that A's signature could not estop him from denying consent to the warrant because H knew A could not read. Accordingly, because the defendant in *L'Estrange v. Grancob* did not expect the plaintiff to read the exemption clause,

41. Langdon argues in a note on this case that non est factum is a plea which has been confined to actions of covenants and that it was a mistake to apply it in a case like this. Langdon, Note 51 L.Q.R 272 at 274.

42. Langdon,, supra at p. 272. See also Samek, 52 Can. Bar Rev. 351

43. (1892) 8 T.L.R. 698; See Spencer, "Signature, Consent and the Rule in L'Estrange v. Grancob" (1973) Cambridge L. J. 104-122.

let alone understand it, the plaintiff should similarly be allowed to deny consent to the exemption clause in question. Plausible as this argument seems, the courts have consistently upheld the rule in *L'Estrange v. Graacob*.⁽⁴⁴⁾

In *Curtis v. Chemical Cleaning and Dyeing Co. Ltd.*,⁽⁴⁵⁾ the plaintiff took her wedding dress for cleaning and was asked to sign a receipt containing an exclusion clause. When she asked for an explanation of the contents of the receipt, the effect of the term was innocently misrepresented to her by the attendant. The dress was damaged. The Court of Appeal held in an action brought by the plaintiff that because of the misrepresentation, no regard was to be paid to the exemption clause.⁽⁴⁶⁾

(ii) The Position in French Law: ⁽⁴⁷⁾

Although exclusion and limitation clauses were in use especially in contracts for the carriage of goods by sea and also in insurance contracts at the time the "Code Civil" was elaborated, the latter did not make any specific mention of those clauses, possibly because they were not flagrant enough to require statutory attention. With the multiplication of these clauses, especially with the advent of standard form contracts, the courts and legal scholars had to fill this gap. The French courts have drawn on articles 1134 and 1135 of the Civil Code to deal with the problem of incorporation of terms into contracts. Article 1134 states that: "Agreements legally made

44. Lord Devlin in *MacCutcheon v. David MacBrayne*, *supra*, note 37; *Thornton v. Shoe Lane Parking*, note 27, *supra*.

45. [1951] 1 K.B. 805.

46. *Jacques v. Lloyd George and Partners Ltd.* endorses this view: [1968] 2 All E.R. 187.

47. See Generally Georges Berlioz, *Le Contrat d'Adhésion*. (L.G.D.J., Paris 1973), pp. 56-67.

take the place of law for those who make them

"They may be revoked only by mutual consent or for causes which the law authorises.

"They must be executed in good faith".

Article 1135 states that: "Agreements obligate not only for what is expressed therein, but also for all the consequences which equity, usage or the law gives to an obligation according to its nature."

Three situations can be distinguished in cases dealing with the incorporation of terms into contracts: when the term is inserted in a notice; when it is in a receipt or ticket; when it is written in the contractual document itself.

(a) Terms written in notices:

From the premises of the articles of the Civil Code mentioned above, some authors have maintained that because consent is absolutely necessary for contractual relations to come about, terms which have not been written into the contractual document are merely unilateral dispositions by one party, not consented to by the other.⁽⁴⁸⁾ Since consent presupposes knowledge of the terms, the party relying on the term must prove that the other party had knowledge of the term. There must be positive evidence to that effect. This view appears to be the equivalent of the rule laid down by Mellish J. in *Parker's case* but it is in reality much stricter.

48. See Jean Carbonnier, Droit civil, tome 4 (Presse Universitaire de France 1969), p. 66; Boris Starck, Droit civil. Obligations, tome II. (Librairie Techniques 1972), no. 1157.

In one case, the owner of a vehicle frequently serviced the vehicle at a particular garage which had notices excluding liability for the loss of any vehicle. Plaintiff's vehicle was lost when a fire broke out in a garage. It was held that because the notices did not form part of the contract, they did not bind the plaintiff. The fact that the plaintiff had been to the garage several times and could therefore be presumed to have seen the exclusion notice was of no import. The court required specific proof of knowledge and assent to the clause in question.⁽⁴⁹⁾

In another case, the Cour de cassation held that the displaying of an exemption clause does not constitute proof that the other contracting party knew of and accepted the clause.⁽⁵⁰⁾

Like the English courts, French courts consider the time the purported notice was given as fundamental in deciding whether a term is incorporated into the contract. In one case,⁽⁵¹⁾ the plaintiff left his car in the garage of a hotel. Minutes later, goods which had been tied to the roof of the car were stolen. It was held that because he saw a notice limiting the liability of the hotel in connection with such losses only after he had parked his car, he was not bound by it. The court held further that for such a clause to be effective, the hotel guard ought to have drawn the plaintiff's attention to the clause before or at the time the car was parked.

49. Colmar, 24 décembre 1953, D. 1953, 375.

50. Bordeaux (1^{ère} Ch.), 20 janvier 1972, Gaz. Pal. juin 1972.

51. Lyon, 12 juin 1950, D. 1951 Som P.2. On the same principle, see also Trib. civ. Toulon, 4 juin 1952, D. 52 jurisprudence, 769. This decision is very similar in principle to Olley v. Marlborough Court.

French law is so antagonistic to attempts to incorporate exclusion or limitation clauses into contracts through displaying notices that one commentator states that cases which have upheld such clauses are mere "judicial curiosities",⁽⁵²⁾ because for this to happen, the courts require exceptional evidence that such clauses have been brought to the knowledge of the other party to the contract and specifically accepted by him.

French law is therefore, at least, as intent on protecting the weaker party to a contract from the devices used by the other to exempt himself from any liability as English law. In this, French law, unlike English law, makes a distinction between consumer and commercial transactions. Because the underlying justification of protecting the adhering party is not expedient in commercial transactions, French law takes a different view. In these cases, exemption or limitation clauses could be incorporated into contracts by reference or by the display of a notice.⁽⁵³⁾

There are however certain instances where a party to a contract will be presumed to have had knowledge of, and given his consent to clauses which figure in notices which do not form part of the contractual document. These are instances when the clauses in question have been approved by an administrative body. Thus, where a carrier had a notice in his office which contained a time-limit for claims clause stipulating that any claim against the carrier must be made

52. Robert, "Une source a mineur de droit civil, les affiches et les écriteaux", J.C.P. 1958. 1. 1458.

53. N. Emmanuel de Pontivace, *Revue Trimestrielle de droit Commercial*, 1968, p. 925; See also Berlioz, note 47 supra. p. 63.

within ten days, a first instance court held that the carrier had done what was sufficient to bring the clause to the knowledge of his customers as was required by article 105 of a decree of 12th June 1939.⁽⁵⁴⁾

(b) Tickets and receipts:

In the nineteenth century, and the early part of this century, French courts upheld conditions which were printed on tickets and receipts. The courts decided thus on the ground that the conditions on the ticket or receipt had modified the original contract and the other party was presumed to have accepted the modifications if he did not protest after receiving the ticket.

In one case, a receipt stipulated that the contract price was payable at the seller's residence. This stipulation had important consequences inasmuch as in the event of a dispute, the proper forum will be that of the seller's residence. The court upheld the clause, stating that the buyer received the receipt without complaining.⁽⁵⁵⁾

This view did not take account of the fact that more often than not, such receipts are not read.

Legal scholars roundly opposed the above reasoning and the courts soon followed suit. The changes began with insurance contracts, where the courts refused to uphold certain clauses inserted on receipts and unsigned documents generally. In one case, the

54. Montpellier, 9 novembre 1954, D. 1955, som., p. 35.

55. Cass. Req. 26 décembre 1898; D.P. 99, 1, 319.

court said that modifications which are of considerable weight, such as the exclusion or limitation of liability should take a more formal form.⁽⁵⁶⁾ The weight of judicial opinion henceforth was that because the parties to the contract (at any rate one of the parties) had not directed their minds to any posterior provisions, it was wrong to uphold clauses figuring in tickets and receipts. Hence, an exclusion clause inserted into a receipt was held not to "fulfil the required conditions to make it valid" by the "Cour de cassation".⁽⁵⁷⁾

Clauses appearing in the main contractual document:

In this case, French law, like English law, attributes paramount importance to signed documents. A signature indicates that the terms appearing on the document have been taken notice of and accepted.⁽⁵⁸⁾ The court cannot in this case hold that the party who signed the contract did not have knowledge of the terms, unless of course there was deceit or misrepresentation. Consequently only the strict interpretation of such clauses can come to the aid of the adhering party to the contract.

B. The Control of Exemption and Limitation Clauses:

In this process one characteristic is common to both legal systems. The legacy of the nineteenth century "freedom of contract" philosophy enshrined in the "will theory of contract" or the

56. Trib. Gde Instance, Seine, 15^e Ch. 19 décembre 1966, R.G.A.T. 1967, p. 32

57. Cass. civ. 1^{ere}, 14 avril 1970, J.C.P. 1971 11 16687. See also: Civ. 2 avril 1971, D. 1972 Som 4. Berlioz, note 47 *supra* at p.65; Limoges, 2^e Ch., 18 janvier 1973; J.C.P. 1973 11 17339.

58. Civ. 1^{er} février 1953, D.53 1. 77 at 30 mars 1892, S.93.1.13.

principle of "l'autonomie de la volonté" in French law, has been that the courts have never considered themselves as having the authority to nullify a contract which has been properly concluded between two or more parties. It is useful to recall article 1134 of the Civil Code which states in categorical terms that: "Agreements legally made take the place of law for those who make them."

Simultaneously however, they have realised that quite often, clauses inserted into contractual documents have been unconscionable on one of the parties and conscious of their justice dispensing role (i.e. fairness), they have devised means of preventing clauses which they deem harsh from applying without saying so in so many words. Although the objectives have been the same, French and English law have proceeded to do this in rather different ways.

I. In English Law:

English law has used three tools in controlling exemption and limitation clauses: A court may construe the clause strictly, against the party relying on it; it can decide that the party in breach has committed a fundamental breach;⁽⁵⁹⁾ finally, a court may use the doctrine of privity of contract to limit the range of persons who are entitled to be covered by such a clause.

(a) Strict Construction:

The rule succinctly states that whoever seeks to avoid any form of liability must use words which unequivocally cover the case in hand. It is simply another version of the 'contra-proferentem'

59. It will be seen later that this is no longer an independent ground for invalidating such clauses.

rule which states that a contractual clause will be construed against the person proffering it. In the case of *Wallis, Son and Wells v. Pratt*,⁽⁶⁰⁾ there was a contract for the sale of what was described as "common English sainfoin". The contract contained a term stating that "the seller gives no warranty express or implied as to growth, description or any other matter". The seed which was delivered under the contract was known as 'giant sainfoin', a seed of lower quality. There was therefore a breach of S.13 of the Sale of Goods Act, 1893, i.e., a breach of the implied condition that the goods must fit the description. Meanwhile, the plaintiff-buyer had accepted the goods and the breach of condition was consequently treated as a breach of warranty within the meaning of S.11 (1)(C) of the Sale of Goods Act. The House of Lords held nonetheless that the defendant could not rely on the exemption clause because it only covered warranties and not conditions. Their Lordships felt that the fact of acceptance of the goods did not change the essential nature of the term from a condition to a warranty.

In *Henry Kendall & Sons v. William Lillico & Sons*,⁽⁶¹⁾ there was a clause excluding liability for "latent defects" of goods. The House of Lords held that the expression "latent defects" only covered liability for the quality of the goods and did not exclude liability for breach of S.14(1) of the Sale of Goods Act, i.e.,

60. [1911] A.C. 394.

61. [1968] 2 All E.R. 444

fitness for purpose. In *Andrews Brothers (Bournemouth), Ltd. v. Singer & Co.*⁽⁶²⁾ a clause exempted all implied warranties and all liabilities. The court held that the clause did not apply to an express term describing the article in the contract and therefore, it did not exempt the seller from liability for delivering an article of a different description.

Minister of Materials v. Steel Bros. & Co. Ltd.,⁽⁶³⁾ is an example of how far the courts are prepared to go in their strict construction of such clauses. It was held in that case that a clause which limited to sixty days the right of one of the parties to complain about the quality of the goods did not apply where the complaint was about defective packing. This decision goes very far because in *Niblett v. Confectioner's Materials Co. Ltd.*,⁽⁶⁴⁾ it was held that the quality of goods includes the state of their packing. The law reports are replete with similar cases. In some instances, one cannot but think that few lawyers can foresee all the different types of interpretations the courts would give to these clauses. It requires a considerable stretching of one's imagination to forestall all the possible objections a court can raise. It is submitted that to suggest as the courts have often suggested that clauses which have after all been drafted by skilled lawyers do not in fact cover cases they were designed to cover is sometimes patent absurdity. This tendency of the courts to go quite beyond their limits is motivated by the desire to protect one of the parties to the contract.

62. [1934] 1 K.B. 17

63. [1952] 1 T.L.R. 499

64. [1921] 3 K.B. 387; See Lawson, Exclusion Clauses. (Oyez Press Ltd. London, 1978), at p. 22.

This tendency is even more conspicuous where the cases involve negligence. The courts assume that it is "inherently improbable that one party should intend to absolve the other party from the consequences of the latter's own negligence".⁽⁶⁵⁾ "If there is a realistic possibility that a party can be made liable irrespective of negligence, an exemption clause in general terms will not be construed so as to cover liability for negligence."⁽⁶⁶⁾

In *White v. John Warwick & Co. Ltd.*,⁽⁶⁷⁾ a contract for the hire of a bicycle contained a clause which stated that: "nothing in this agreement shall render the owners liable for any personal injuries to the riders of the machine hired". The plaintiff fell when the saddle of the bicycle (which was defective) tipped over. It was established that the defendants were negligent. The defendants were liable either in strict liability for breach of contract or in negligence. The Court of Appeal held that the exemption clause could only cover the former and not the latter ground.

The high water mark of such construction must be *Hollier v. Rambler Motors (A.M.C.) Ltd.*⁽⁶⁸⁾ The plaintiff's car was in the defendant's garage when a fire broke out as a result of the defendant's negligence and as a result, the plaintiff's car was destroyed. The defendants relied on an exclusion clause in their defence which was as follows: "The Company is not responsible for

65. *Gillespie Bros. Ltd. v. Roy Bowles Transport Ltd.* [1973] Q.B. 400 at 419.

66. Treitel: Law of Contract. 5th edn. (London, Stevens & Sons 1979), at p. 158.

67. [1953] 1 W.L.R. 1285

68. [1972] 1 All E.R. 399.

damage caused by fire to customers' cars on the premises". Because the defendants were bailees, they were only responsible in negligence. Although the Court acknowledged this, it went on to hold that the clause did not however cover this case. Salmon L.J. said at p.406: "In my view, the words of the condition would be better understood as being meant to be a warning to the customer that if a fire does occur at the garage which damages the car, and it is not caused by the negligence of the garage owner, then the garage owner is not responsible for damage". It is not difficult to see why some commentators have taken issue with the Court of Appeal on this case.⁽⁶⁹⁾ Surely, if there was only one means by which liability could come about, then that is what was envisaged by the drafters of the exemption clause.

In *Gillespie Bros. Ltd. v. Roy Bowles Transport Ltd.*,⁽⁷⁰⁾ Buckley L.J. held that a clause by which one party agreed to indemnify the other "against all claims or demands whatsoever", was applicable where the liability arose out of negligence. He said words like "however arising" and "from any cause whatsoever" were sufficient to exclude liability for negligence. His judgment did not however find favour with the House of Lords in *Smith v. South Wales Switchgear*,⁽⁷¹⁾ where in a contract to overhaul a factory, there was a clause that the overhaulers were to indemnify the factory owners against any liability, loss, claim or proceedings

69. See Barendt, (1972) 35, *Modern Law Review* p. 644. This case can be contrasted with *Rutter v. Palmer* [1922] 2 K.B. 87

70. [1973] 2 Q.B. 400

71. [1978] 1 W.L.R. 165.

arising in the course of executing the order. The House of Lords held that the factory owners could not be indemnified against liability which had been incurred as a result of their negligence. They could only be indemnified against liability arising from acts or omissions committed by the other party in performing the contract. On the facts of this case, this seemed a proper decision. The House of Lords however went further to criticise Buckley L.J.'s statement that the words "whatsoever" and "however arising" necessarily covered negligence. They felt that the word "negligence" or a synonym of it ought to be used.

(b) Fundamental Breach:

Until recently, the doctrine of fundamental breach was a major device used by the courts to deal with the injustices of exemption or limitation clauses. The essence of the doctrine has been very simply described thus: "A party who has been guilty of a fundamental breach of contract cannot rely on an exemption clause inserted into the contract to protect him".⁽⁷²⁾ What precisely amounts to fundamental breach and the question whether it is a substantive rule of law or merely a rule of construction have been subject to a lot of controversy and it is only fairly recently that the House of Lords has given a categorical answer to the latter question.⁽⁷³⁾

The origin of the doctrine has been traced to a series of three judgements given by Devlin J. as he then was. The first of these

72. A.G. Guest, "Fundamental Breach of Contract", 77 L.Q.R. 98.

73. See Coote, Exception Clauses. (Sweet and Maxwell, London, 1964); Coote, "Discharge for Breach and Exception Clauses since Harbutt's Plasticine", (1977) 40 M.L.R. 31; Treitel, 29 M.L.R. 546; Fridman, Alberta Law. Rev. 281.

three was *Chandris v. Iabrandtsen-Moller*,⁽⁷⁴⁾ where Devlin J. referred to a breach of contract as being a "fundamental breach going to the root of the contract". In the second case, *Alexander v. Railway Executive*,⁽⁷⁵⁾ a bailee allowed some unauthorised person to claim the plaintiff's goods. Devlin J. held that that was a fundamental breach which disentitled the bailee from relying on an exclusion clause in the contract. In so far as these cases related to contracts for the carriage of goods and bailment, there was no particular novelty for the House of Lords had expressed similar views in *Hain S.S. Co. Ltd. v. Tate and Lyle Ltd.*⁽⁷⁶⁾ The novelty came when Devlin J. applied the same reasoning to a sale of goods contract in *Smeaton Hanscomb v. Saboon I. Setty*.⁽⁷⁷⁾ Timber sold by description did not correspond to the contract specifications. There was therefore a breach of the condition implied by S.13 of the Sale of Goods Act 1893. The contract however contained a fourteen-day time limit clause on claims which had expired before the complaint was made. Devlin J. held that the clause applied since the logs delivered were "round mahogany logs" as the contract stipulated. He went on to say that: "It is no doubt a principle of construction that exceptions are to be construed as not being applicable for the protection of those for whose benefit they are inserted if the beneficiary has committed a breach

74. [1951] 1 K.B. 240 at p. 248.

75. [1951] 2 All E.R. 442

76. [1936] 2 All E.R. 597

77. [1953] 1 W.L.R. 1468

of fundamental term of the contract..." He went on to express a test for what may amount to fundamental breach as being whether there was performance entirely different from that contemplated by the contract.⁽⁷⁸⁾ Lord Wilberforce in the Suisse Atlantique reiterated the test when he said: "If the breach results in a non-contractual performance of the contract so that the innocent party is deprived of the total benefit of the agreed consideration, then it is a fundamental breach of the contract. In other words, if the purported performance is totally different from that which the contract contemplates, there is a fundamental breach of contract"⁽⁷⁹⁾. This element of total failure of consideration distinguishes fundamental breach from a breach of condition or fundamental term.⁽⁸⁰⁾

Although Devlin J. was careful not to say expressly that this new doctrine was substantive, it did not take long for Lord Denning to restate it in substantive terms without any quibble. In Karsales (Harrow) Ltd. v. Wallis,⁽⁸¹⁾ the defendant agreed to hire a car from a finance company. He was shown a car which was subsequently towed at night to the defendant's premises, most of its detachable parts having been taken away, and the car would not go. The Court of Appeal held that a clause excluding all conditions and warranties, express or implied, did not bind the

78. Melville, 130 New L.J. 646 is right in saying that fundamental breach was invented in a purely hypothetical situation. It was irrelevant to the facts of Smeaton Hanscomb v. Sassoon I. Setty. Although Devlin J. was purporting to apply a rule of construction, he was on a close reading of the three cases actually applying a substantive doctrine.

79. See note 85, *infra*, p. 393.

80. See Thomson, "Fundamental breach in Scots and English Law", *The Juridical Review* (1977) p. 38 at 41-42.

81. [1956] 2 All E.R. 868.

defendant. In his judgement, Denning L.J., as he then was, said: "it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects." "They do not avail him when he is guilty of a breach which goes to the root of the contract."

Prof. Coote has pointed out that this substantive doctrine put forward by Denning L.J. lacked previous warrant. Secondly, Prof. Coote contends that this doctrine is tantamount to saying that the core of obligation in a contract cannot be excluded, a pronouncement clearly incompatible with the decision in *Rose & Frank v. Crompton Bros.*⁽⁸²⁾ where the House of Lords accepted that all sorts of obligations could be excluded through the use of an 'honour clause'.

This substantive doctrine of fundamental breach was applied in *Yeoman Credit Ltd. v. Apps.*⁽⁸³⁾ where a car subject to a hire-purchase transaction suffered from such a congeries of defects as to constitute a fundamental breach, thereby excluding the exemption clause.

This new formulation of the doctrine of fundamental breach did not go unchallenged. In *U.G.S. Finance Ltd. v. National Mortgage Bank of Greece and National Bank of Greece, S.A.*,⁽⁸⁴⁾ Pearson L.J. said that the rule of fundamental breach was a rule of construction

82. [1925] A.C. 445

83. [1962] 2 All E.R. 281

84. [1964] 1 Lloyd's Rep. 446 at 453; see also *Game Farm v. Suffolk Agricultural and Poultry Producers Assn. Ltd.* [1956] 1 W.L.R. 287, at pp. 341-343.

which gives effect to the intention of the parties and not a rule of law. This view was endorsed, although not with enough emphasis, in the *Suisse Atlantique case*.⁽⁸⁵⁾ Although their Lordships held that the rule was one of construction, they did not overrule the cases which referred to it as a rule of law, preferring to explain them as instances of construction. Some of the dicta of the Law Lords might be taken to infer that the rule could at times, be one of law. The facts of this case were not ideal because the clause which was in issue here was a demurrage clause stipulating the payment of \$1000 per day and not an exclusion clause. The owners of the ship lost earnings on a hundred and fifty days lost because of the charterer's delay. Because that loss was much more than the damage payments would have amounted to, they brought an action against the charterers arguing that the excessive delays amounted to a fundamental breach of contract. A further twist to the facts was that the owners had affirmed the contract after having had knowledge of the alleged fundamental breach. The House of Lords held that assuming that the clause was an exception clause, and that the breach in question was a fundamental breach, the clause would still have applied because there was no rule of law that in the event of a fundamental breach, the application of any exclusion or limitation clause was thereby excluded. Lord Reid refused to accept the substantive doctrine because it "would not be a satisfactory solution to the problem which undoubtedly exists" (the problem of exclusion and limiting clauses). Lord Wilberforce

85. [1967] 1 A.C. 361.

on his part expressed the view that while the doctrine was not substantive; "one may safely say that parties cannot in a contract have contemplated that the clauses should have so wide an ambit as in effect to deprive one party's stipulation of all contractual effect". Lord Reid however said that if the innocent party elects to treat the contract as discharged, then the entire contract as well as the exclusion clause comes to an end. This remark enabled the Court of Appeal, particularly Lord Denning to revert to the substantive doctrine of fundamental breach in *Harbutt's Plasticine v. Wayne Tank & Pump Co. Ltd.*⁽⁸⁶⁾ In that case, the defendants agreed to design, build and install a heated pipe-line and tank system for the plaintiff. The installation eventually proved wholly unsuited for its purpose and the plaintiff's factory was consequently burnt down. There was a clause in the contract limiting the defendants' liability for loss to the contract price, which was immeasurably less than the actual damage suffered.⁽⁸⁷⁾ Stephenson J., at first instance, held that the defendants had committed a fundamental breach of contract which disentitled them from relying on the limitation clause. The Court of Appeal affirmed the judgment. Lord Denning held that the *Suisse Atlantique* decision that there was no substantive rule of fundamental breach applied only

86. [1970] 1 Q.B. 447 (Court of Appeal)

87. The plaintiffs had meanwhile been largely compensated by their insurers who brought this action in the plaintiff's name.

in cases where the innocent party had affirmed the contract (as was the case in the *Suisse Atlantique*), and in support for his decision, he relied on Lord Reid's view that where an innocent party elected to treat the contract as discharged the whole contract including the exclusion or limitation clause came to an end.⁽⁸⁸⁾ This reasoning was reiterated by Lord Denning in *Farnworth Finance Facilities Ltd. v. Attridge*.⁽⁸⁹⁾ In this case, there was a "congeries of defects" in a motor-cycle under a hire-purchase agreement which according to the Court of Appeal, amounted to a fundamental breach. Lord Denning felt that that was sufficient to disentitle the finance company from relying on their exemption clause.⁽⁹⁰⁾

In the aftermath of *Harbutt's Plasticine* and *Farnworth Finance Facilities v. Attridge*, the courts have been torn between following either the House of Lords decision in the *Suisse Atlantique* or the Court of Appeal in *Harbutt's Plasticine*. Thus, in *Kenyon, Son & Craven Ltd. v. Baxter Hoare*,⁽⁹¹⁾ Donaldson J. thought that there was no authority in the *Suisse Atlantique* case for applying the doctrine of fundamental breach in cases other than those where the breach results in an entirely different performance from that

88. See Leigh-Jones & Pickering: "*Harbutt's Plasticine v. Wayne Tank & Pump Co. Ltd., Fundamental Breach and Exemption Clauses. Damages and Interest*"; 86 L.Q.R. (1970) p. 513.

89. [1970] 1 W.L.R. 1053

90. Lord Denning introduced the notion of unequal bargaining power in this case.

91. [1971] 1 Lloyds Rep. 232.

contemplated by the contract. Hence, an exception clause in a bailment contract between the plaintiff and the defendant was enforced although the defendant's negligence caused twenty per cent of the plaintiffs ground-nuts to be destroyed by rat infestation. That case therefore limits the scope of *Harbutt's Plasticine*. Kerr J. showed himself unimpressed by Lord Denning's reasoning when in *The Angelia*,⁽⁹²⁾ he said an event for which liability is clearly excluded by an express agreement could not be a breach, let alone a fundamental breach. Lord Denning and the Court of Appeal however, persisted with the substantive rule of fundamental breach.⁽⁹³⁾

Photo Production Ltd. v Securicor (Transport) Ltd.⁽⁹⁴⁾ has finally, or at any rate for the time being, put the controversy to rest. The case involved a contract in which the defendants provided patrol services to the plaintiffs' factory. A clause in the contract provided that under no circumstances should the company be responsible for any injurious act or default by any of its employees unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer. Another clause limited the defendant's liability in any event. The defendant's employee who was on inspection deliberately started a fire which resulted in plaintiff's loss of £615,000. At first instance, the plaintiff argued that the

92. [1973] 1 W.L.R. 210

93. See *Wathes v. Austins (Menswear) Ltd.* [1976] 1 Lloyd's Rep. 14; *Levison v. Patent Steam Carpet Cleaning Co.* [1978] Q.B.68.

94. [1980] 2 W.L.R. 283.

defendant had committed a fundamental breach which therefore divested them of their right to rely on the exception clause. McKenna J., referring to Kerr J. in the *Angelia*,⁽⁹⁵⁾ held that since the parties had expressly provided that the defendant would not be "responsible" if a particular event occurred, the occurrence of that event cannot be treated as a breach of contract.⁽⁹⁶⁾

This was clearly against the view Lord Denning and the Court of Appeal had been canvassing all along; not surprisingly therefore, the judgement was reversed on appeal. In his judgement, Lord Denning said: "The Court itself deprives the party of the benefit of an exemption or limitation clause if he is guilty of a breach of fundamental term or of a fundamental breach of one of the terms of the contract".⁽⁹⁷⁾ He therefore gave the doctrine an even wider scope than he had previously done. He tried to appear consistent with the *Suisse Atlantique* decision by saying that it was the presumed intention of the parties that in the face of a breach such as the present one, i.e. destruction due to defendant's employee's arson, the exception clause would not apply.

The House of Lords seized the occasion to give a death blow to the substantive doctrine of fundamental breach. Lord Diplock endorsed McKenna J's view that the exception clause modified the

95. Note 92 supra at pp. 230-231.

96. This view had been put forward by Coote: Exception Clauses note 73 supra, where he said exception clauses are of two types. Some prevent the accrual of primary rights while others are mere shields to claims.

97. [1978] 1 W.L.R. 856 at p. 863.

primary obligation imposed on the defendant.⁽⁹⁸⁾ The House of Lords made it clear that in construing the contract, regard must be paid to the question whether it is a commercial or a consumer contract. In commercial contracts where risk allocation is fair all the parties can take the necessary steps to get insurance cover, the courts should not be astute in construing the clause too strictly.⁽⁹⁹⁾ *Harbutts Plasticine and Wathes v. Austins (Menswear) Ltd.* were overruled.

(c) Exemption Clauses and Third Parties:

The doctrine of privity of contract has been used to limit the range of persons who may benefit from an exclusion clause. This is usually applied in commercial cases where persons such as agents or independent contractors seek to avoid or limit their liability by pleading an exclusion or limitation clause inserted in the contract between parties other than themselves. The attitude of the courts has been until very recently to prevent such third parties, with the possible exception of agents, from benefiting from such a clause.⁽¹⁰⁰⁾ This approach was thought to have been made sacrosanct by the House of Lords in the case of *Scruttons v. Midland Silicones Ltd.*⁽¹⁾ The defendants, Scruttons Ltd., were stevedores acting for the United States Lines in London. Their contract with the latter included a clause stipulating that they

98. [1980] 2 W.L.R. 283 at p. 295.

99. *Ibid* at pp. 296-295.

100. See *Dunlop v. Selfridge & Co. Ltd.* [1915] A.C. 847; Lord Haldane said: "Our law knows nothing of a *jus quaesitum tertio* arising by way of contract" at p. 853.

1. [1962] A.C. 462.

were to have the benefit of any excluding or limiting terms inserted in the bill of lading. This was however unknown to the plaintiffs, owners of a drum of chemicals damaged by the defendant stevedores. In an action against them, they sought protection under the limiting clause in the bill of lading. The House of Lords held that the defendants could not benefit from any of its clauses. The established exception to this rule, viz, that the party who entered into the contract did so as an agent for the party benefiting from it did not apply since the defendants could not by any stretch of imagination be considered the principals of the shipping line. The stevedores were clearly independent contractors. The stevedores further argued that even if they were independent contractors, they were still entitled to the benefit of the exemption clause in the bill of lading on the authority of *Elder, Dempster & Co. v. Patterson Zochonis & Co.*⁽²⁾ Viscount Simonds in dismissing that argument, said that the House of Lords was bound by precedent only if the ratio decidendi of the case was clear. That was not the case with the decision in *Elder, Dempster*, he thought. It was not clear, he felt, whether the House of Lords specifically decided that the exception to the doctrine of privity could be extended to independent contractors.

2. [1924] A.C. 552. The House of Lords assumed in this case that a person not a party to a contract could under certain circumstances get the benefit of an exclusion or limitation clause inserted in the contract.

In *Mersey Shipping & Transport Co. Ltd. v. Rea Ltd.*,⁽³⁾ Scrutton, L.J. explained the rationale in *Elder, Dempster* thus: "... where there is a contract which contains an exemption clause, the servants or agents who act under the contract have the benefit of the exemption clause. They cannot be sued in tort as independent people, but they can claim the protection of the contract made with their employers on whose behalf they are acting". In Viscount Simond's view, the use of the word "agents" thus excluded independent contractors.

In *Adler v. Dickson*,⁽⁴⁾ servants of a company, i.e. master and boatswain, could not get protection from a clause which was part of an agreement between the company and the plaintiff which stated that ... "the Co. will not be responsible for any injury whatsoever... arising from or occasioned by the negligence of the co's servants". Jenkins L.J. said categorically that the company's servants are not parties to the contract. It follows that however the clause was drafted, no servant of the company could benefit from it.

This stringent way of construing exemption clause with regard to third parties did not appeal to all judges. Devlin J. attempted to create an inroad into this construction in *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.*⁽⁵⁾ The plaintiff in this case was not a party to a contract of carriage of goods which had been made between the

3. [1925] 21 LL.L.R. 378

4. [1954] 1 All E.R. 397

5. [1954] 2 Q.B. 402.

defendant and a third party. That contract contained a limitation clause. Plaintiff's goods were damaged by the defendants. Devlin J. held that although not a party to the contract, the plaintiff was bound by the clause because he would have been entitled to its benefit. Commenting on this decision, Viscount Simonds in *Midlands Silicones*, felt that the decision turned on the special facts of the case which justified the implication of a contract between the plaintiff and the defendant.⁽⁶⁾

The first case to go expressly against the rule laid down in *Sorutons v. Midlands Silicones* was *New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co.* an appeal to the Privy Council from New Zealand. In that case, stevedores were sued by the consignees of machinery which was damaged while being unloaded. The stevedores were not of course parties to the contract which contained a clause stipulating that: "It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or owner of the goods or to any other holder of this bill of lading for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment...". The stevedores relied on a one-year time limit on claims clause contained in the Hague rules which were incorporated in the bill of lading.

6. [1962] A.C. 446 at p. 471.

The Privy Council, by a majority of three to two, decided, not without some difficulties, that the stevedores could claim protection under the clause, although not being themselves parties to the contract.

As Lord Wilberforce put it, the difficulties lay in the fact that "... English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration".⁽⁸⁾ In this case therefore, in order to circumvent the doctrine of privity, the majority of the Privy Council thought that the "bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shippers (consignors) and the stevedores, made through the carrier as agent".⁽⁹⁾ Only by twisting established principles relating to the formation of contracts could they succeed in giving expression to the clearly discernible intention of the parties. Not surprisingly, this approach was conceptually distasteful to the minority who felt that to read into the contract an agency relationship was stretching the law too far.

Donaldson J. has given a new dimension to this new approach. In *Johnson Mathey & Co. Ltd. v. Constantine Terminals Ltd.*,⁽¹⁰⁾ 'A' bailed goods with 'B' who sub-bailed them with 'C', in whose care the goods were lost. Donaldson J. held that 'C' could rely on an exclusion clause made between 'A' and 'B'. He thought that *Soruttone Ltd. v. Midland Silicoones* would have applied only if 'A' could sue without alleging bailment.

8. Ibid at p. 1020

9. Ibid at p. 1020.

10. [1976] 2 Lloyds Rep. 216

In the light of these inconsistencies, Treitel states that:
"The doctrine of privity was never a satisfactory instrument for controlling undesirable exception clauses, and should no longer be used for this purpose now that such clauses are directly controlled under the Unfair Contract Terms Act 1977".⁽¹¹⁾

II The Position in French law:

The treatment of exclusion and limitation clauses in French law is by no means readily ascertainable. As it has already been pointed out, it consists of extrapolating from certain articles of the Civil Code by the courts; consequently as in English law the decisions from the courts are not always consistent. Attempts to apply one general principle such as the doctrine of "abus de droit" (abuse of right) have failed essentially because it is fundamentally inconsistent with the general provision of article 1134 of the Civil Code which states that: "Agreements legally made take the place of law for those who make them". Unlike English law however, there had been many legislative interventions in this area even before the comprehensive law of 10th Jan. 1978 on standard form contracts.

The question whether exclusion or limitation clauses properly speaking should be distinguished from clauses defining the scope of contractual obligations has also been raised in French law. In one case,⁽¹²⁾ a company which hired out refrigerated trucks stipulated in

11. Treitel, Law of Contract, 5th ed. (London, Stevens & Sons, 1979) at p. 473.

12. Com. 15 Juin 1959, D. 1960.97 cassant Paris, 13 juin 1957 D. 1957 531, note Rodière.

its contract that it did not warrant the truck to be of the required temperature. The hirer lost his consignment of chickens because the temperature in the truck was 40°C. The "Cour de cassation" held that the clause was one defining the extent of the hirer's contractual undertaking; he simply undertook to provide a refrigerific truck without promising to ensure that it was in fact fit for its purpose. This distinction is very important because while such clauses are upheld by the courts without any qualifications, the story is entirely different when the clause is adjudged to be an exclusion or limitation clause which seeks only to avoid or restrict liability. The latter, although valid in principle has been hedged by numerous qualifications and the courts have held in certain cases that they are downright invalid as a matter of law. Important as this distinction may be, it is very tenuous indeed; and very few cases do draw the distinction.

(a) Exclusion and limitation clauses in contracts generally

These clauses are in principle upheld in accordance with the principle of freedom of contract. Allusion is often made to article 1150 of the Civil Code in support of the validity of these clauses.⁽¹³⁾ Article 1150 states that: "A debtor is held only to damages which were foreseen or which could have been foreseen at the time of the contract, when it is not by his wilfulness that the obligation is not executed". If a contract therefore stipulated that damages shall not exceed a certain amount, that is clearly foreseeable within the meaning of art. 1150. A preliminary point to note is that if non-performance is deliberate, then the general principle will not obtain.

13. B. Starck: Droit civil, Obligations, tome II Libraries Techniques (1972) no 2146 p. 638.

Although the same principle applies to both exclusion and limitation clauses in theory, in practice, the courts have treated them differently. As Starck⁽¹⁴⁾ argues, a contractual obligation which is devoid of all sanctions is not at all an obligation (i.e. when there is a clause excluding all liability). Hence, the courts have been stricter in their interpretation of exclusion clauses than in their interpretation of limitations clauses. Indeed, before 1948 the difference was very remarkable. The only effect of exclusion clauses was to reverse the onus of proof. In order to elucidate this point, it is necessary to distinguish between what is known in French law as "obligation de moyens" from "obligations de résultat". In the former, the promisor undertakes to provide the "means" he possesses to ensure performance. An example of such an obligation is the contractual obligation of a doctor to cure his patient. He is not in breach of his contract if he does not cure his patient provided he acted with the care and diligence. To determine that he is in breach, the promisee will have to prove fault. On the other hand, in "obligation de résultat", the promisor promises a definite result, for example, a car dealer or manufacturer undertakes to provide a car that functions properly. Whereas in the former case, a promisee alleging breach of contract by the promisor has to prove it, in the latter case, the very non-performance of the obligation implies fault and the onus to disprove fault therefore lies on the promisor.⁽¹⁵⁾

14. B. Starck: "Observations sur le régime juridique des clauses de non-responsabilité ou limitatives de responsabilité" D. 1975, Chronique XX, no. 25.

15. Jean Carbonnier, *Droit civil*, tome 4, P.U.F., no. 71, p. 233.

Before 1948, the courts held that the effect of an exclusion clause was to reverse the onus of proof and to lay it on the promisee. If the promisee succeeded in proving a fault on the part of the promisor, the exception clause did not apply, however slight the fault was.⁽¹⁶⁾ This obviously applied only in cases of "obligation de résultat". The reason given for this interpretation (if one might call this interpretation) of exception clauses was that a tortious liability was born out of the contractual relationship. Since tortious liability was in the public interest (ordre public), no party might exonerate himself from it.

This interpretation of exclusion clauses was obviously not correct as far as legal scholars were concerned. As Starck put it, "rarely was such a number of mistakes accumulated in a single judicial interpretation".⁽¹⁷⁾ Non-performance of a contractual obligation, even if caused by a fault on the part of the promisor can only lead to contractual and not tortious liability. As far as French law is concerned, this reasoning is patently wrong.

In 1948, in a series of cases, the "Cour de cassation" made a volte-face in the interpretation of exclusion clauses. In one case,⁽¹⁸⁾ an employee parked his bicycle in a garage provided by his employer for that purpose. There was however a clause which figured in a notice in the garage as well as in the employment contract in which the employer excluded responsibility for the loss of any vehicle parked

16. See Civ. 3 août 1932: D. 1933 1, 49, note Josserand.

17. Starck, Observations, note 15 supra; no. 29.

18. Soc. 3 août 1948: D. 1948 536.

in that garage. The bicycle was stolen. The Court of Appeal of the Seine held that the theft could only have taken place because of lack of proper organisation in the garage or because the guard failed in his duty. The court held therefore that the employer could not rely on the exclusion clause. The 'Cour de cassation' held that the lower court was wrong. Even if it was established that the employer was at fault, it was not sufficiently serious to deprive the exclusion clause of its effect.

This appears to be the new approach in dealing with exclusion clauses⁽¹⁹⁾. Clauses limiting liability have on the other hand been generally upheld. Whenever the court however thinks that the effect of the clause is to limit liability so much that it becomes derisory in comparison with the actual damage suffered by the innocent party, such a clause would be construed as an exclusion.⁽²⁰⁾ Before 1948 this would of course mean that its effect would simply have been to shift the burden of proving fault onto the innocent party. Since 1948 the gulf between the interpretations of the two different clauses has been narrowed. Both are now valid unless the party relying on the clause did commit a serious fault ("faute lourde") or deceit ("dol") in the performance of the contract.

19. Some cases have still been dealt with on the basis of the pre-1948 construction. In one case, the plaintiff rented a warehouse at the defendant's railway station. A carriage containing benzol standing near the warehouse caught fire and the fire spread to the warehouse, destroying its contents. The "Cour de cassation" held in an appeal brought by the plaintiff's insurers that the exclusion clause in the contract was ineffective because although contractual liability appeared to have been excluded, tortious liability which sprang from the contract remained.
20. See Colmar, 24 nov. 1950; D.1951, 150; Civ. 17 mai 1950, D. 1950, p. 465. Martine; "L'Option entre la responsabilité contractuelle et la responsabilité delictuelle" (These) Paris 1957 L.G.D.J.

There has been some uncertainty as to whether a clause excluding or limiting liability for personal injury resulting from a breach of contract can be valid. The weight of opinion is that such a clause is a nullity because it goes against the principle of "intangibilite et indisponibilite' de la personne humaine".⁽²¹⁾ What this means is that because man cannot be evaluated in purely commercial terms, no clause should restrict the liability which ought to follow personal injury or death resulting from a breach of contract. It is assumed that such a clause would lead to carelessness and it is therefore in the public interest to oppose the validity of such clauses. This contention is predicated upon the false premise that the clause will permit manufacturers etc., to cause their customers to be injured with impunity.⁽²²⁾ This is not however the case because all that the limitation clause achieves in this connection is to limit the damages which would have to be paid to the injured party; it does not absolve him from liability altogether. What the supporters of the above view desire is that liability for personal injury should never be excluded from the scope of the contractual obligations between the parties which is a different question from whether such liability could be limited.⁽²³⁾

This issue is no longer as important as it was before special legislation was enacted to deal with it in contracts for the carriage of persons where such problems often arose. In a fairly recent case,⁽²⁴⁾ a limitation clause which purported to cover personal injuries was validated by the "Cour de cassation".

21. Mazeaud et de Juglart, Lecons de droit civil, t.2 Editions Montchrestien, 1973, no. 636.

22. See Toulouse, 23 Octobre 1934, D. 1935. 2.49; Paris 25 mars 1954, Sem. Jur. 1954 8094, note Rodiere; Mazeaud, Gaz. Pal. 1934 2.890.

23. See note 13 supra.

24. Civ. 1ere 3 Juin, 1970, D. 1971 373.

The major barriers to the application of exclusion and limitation clauses in French law are "dol" and "faute lourde".

The English law term which is nearest in meaning to "dol" in French law is "deceit", although "dol" does not necessarily suggest a fraudulent motive. Article 1116 of the Civil Code states that: "Deceit is a cause for nullity of an agreement when artifices used by one of the parties are such that it is evident that, without such artifices, the other party would not have contracted". The courts have enlarged the scope of the application of this article to include bad faith; for instance if a party remains silent when he ought to have made a statement.⁽²⁵⁾ It has also been held in sale of goods contracts that failure to explain or disclose the meaning of a stipulation is tantamount to deceit, i.e. "dol".⁽²⁶⁾ The above is similar to cases in English law where an exclusion or limitation clause has been held to be inapplicable because of a misrepresentation.⁽²⁷⁾ It relates to the formation of the contract. It should be distinguished from what is known as "faute dolosive", i.e. intentional fault during the performance of the contracts. Where a party wilfully commits a fault which leads to a breach of contract, he cannot get the benefit of an exclusion or limitation clause. "Faute lourde" which literally means a serious or grave

25. Civ. con. 29 nov. 1971 Gaz. Pal. 1972 1. 237.

26. See de Juglart, "L'Obligation de renseignement dans les Contrats", Rév. trim de droit civ. 1945 p.

27. See Mendelssohn v. Normanol Ltd (1970) 1 Q.B. 177.

fault which induces a breach of contract is a fault which although not intentional (i.e. *faute dolosive*"), is so gross that the perpetrator is treated in law as having intended⁽²⁸⁾ its consequences.

Although an ordinary fault resulting in a breach of contract will not exclude the application of an exemption or limitation clause, the courts have often expanded the scope of "*faute lourde*", i.e. broadened its definition, so as to exclude the application of clauses they consider to be very harsh.⁽²⁹⁾

Special Cases:

(b) Contracts for the sale of goods:

Article 1641 of the Civil Code states that "The seller is held to a guarantee against hidden defects in the thing sold which render it unsuitable to the use for which it is intended, or which so diminish such use that the buyer would not have purchased it, or would have given only a lesser price for it, had he known of them". This law is however not imperative and can be varied by the parties. This has led many dealers and manufacturers to insert exclusion or limitation clauses in their standard sale forms. Article 1643 states that:

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28. This approach to exclusion and limitation clauses by French law is not without some resemblance to the substantive doctrine of "fundamental breach". In the Photo Production case for instance, the Court of Appeal held that because the fault which led to the breach was intentional, i.e. "*faute dolosive*" in French law. The exclusion clause would not apply. Similarly, in Harbutt's plasticine, although the fault was not intentional, it was so serious ("*faute lourde*" in French law), that the guilty party was not allowed to rely on the limitation clause. See Com. 12 juin 1950, Gaz. Pal. 1950, 2. 195.
29. Joseph Frossard, "La distinction des obligations de moyens et des obligations de résultat". Paris L.G.D.J. 1965, no. 472.

"He[the seller] is liable for hidden defects, even though he did not know of them, unless, in such a case, he had stipulated he would not be obligated for any guarantee". From this article, it can be inferred that if the seller knows of the hidden defect, then the exclusion or limitation clause will not apply in any event. The article is therefore consistent with the general interpretation of exclusion of limitation clauses, i.e. if there is deceit or a serious fault on the part of the person relying on the clause, the clause becomes inapplicable.

Contrary to the spirit of article 1643, however, the courts in France have nevertheless refused to give any effect to exclusion or limitation clauses irrespective of whether the seller knew of the hidden defect in the goods sold so long as the seller was a professional person - manufacturer, wholesaler or even retailer - in the business concerned. The courts have established a presumption that such a seller has knowledge of the hidden defect in the goods sold and this presumption has become irrebuttable.⁽³⁰⁾ Even a clause in a contract stipulating that the goods are sold "in the state in which the buyer finds it" has not succeeded in circumventing this exceedingly strict rule.⁽³¹⁾ Some sellers tried to side-step the force of this rule by limiting only the time during which a claim based on the legal guarantee required by article 1641 and 1643 (i.e. time-limit clause on claims). The courts have treated such clauses as limitation clauses.

30. See Philippe Malinvaud, "Pour ou contre la validité des clauses limitatives de la garantie des vices cachés". Sem. Jur. 1975 D. 2690.

31. See also: J.F. Overstake, "La responsabilité du fabricant des produits dangereux". Rév. trim. de dt. civ. 1972 485.

This position was taken by the "Cour de cassation" in the mid-fifties⁽³²⁾ and has seen little or no changes. It is difficult to fathom the reason for imposing such a strict liability on sellers. It is common knowledge that a defect in a single screw might immobilise an oil tanker. Why should the manufacturer or seller be liable for such an unpredictable damage even when no fault, however slight can be attributed to him? It has been held by the "Cour de cassation" that the reason lies in public policy.⁽³³⁾ It is in the public interest that the public at large should at all times be protected from defective goods. It is the place of the sellers to insure against any possible defects in their goods.

Controversy still looms over the question whether this presumption of "bad faith" on the part of the seller should be limited to instances where he deals with non-professional people, i.e. consumers, or whether it should be extended to cases where he deals with another professional person.

In a recent case⁽³⁴⁾, an engineering company which was building a fruit-juice factory in Morocco bought a machine for filling and corking bottles from the defendant. The machine had a hidden defect. The defendant however relied on an exclusion clause and contended that the plaintiff's company being experts themselves, the exclusion clause

32. Civ. 24 avril 1954 J.C.P. 1955 II 8565

33. Cass. con. 20 janv. 1970; Cass. civ. 1^{ere} 28 avril 1972 II 17280.

34. Cass. Com. C partielle, 28 avril 1980 Sem. Jur. 1980 IV p. 263.
Also, Cass. com. R. 6 nov. 1978, Sem. Jur. 1979 IV. 24.

ought to apply. The "Cour de cassation" held that because the plaintiffs were specialists in a different field, they bought as "consumers". The exclusion clause was thereby ineffective. Many jurists have roundly condemned this manner of dealing with exception clauses.⁽³⁵⁾ On the one hand, to say a firm of engineers buys a machine as consumers because they are not specialists in that field, is stretching the meaning of consumer to breaking point. On the other hand, in such cases, the public interest image of the "Cour de cassation's" interpretation is entirely without any grounds. Because it is unlikely that a commercial contract between such parties would be an adhesion contract, the need for protection is absent.

Many legal scholars think that there should be a distinction between consumer contracts and commercial contracts in this respect, and that the presumption of "bad faith" should only apply in the former.⁽³⁶⁾ Indeed some decisions of the "Cour de cassation" have opened the way for such a distinction. In one case, *affaire Lerondel c. Lizeul*,⁽³⁷⁾ a garage owner bought a second hand lorry from the defendant who was also a motor dealer. The lorry had a hidden defect. The judges at first instance held that the exclusion clause which

35. See especially, J. Bigot, *Plaidoyer pour les clauses limitatives de garantie et de responsabilité dans les contrats de vente et de fourniture entre les professionnels*.

36. See J. Bigot note 35 *supra*; Philippe Malinvald, "Pour ou contre la validité des clauses limitatives de la garantie" note 32 *supra*. no 19-22, B. Stark, *Observations sur le régime juridique des clauses de non-responsabilité ou limitatives de responsabilité*, D. 1974, *Chronique XX* no. 64-71.

37. Cass. con 8 octobre 1973; D. 1973, som. 152; J.C.P. 1975, 11, 17927 obs. Ghestin.

stated that the sale is "at the buyer's risk" was applicable. The "Cour de cassation", in affirming the lower courts' judgement, said that the buyer, a professional person, had bought the lorry with the full knowledge of the risks involved. In another case,⁽³⁸⁾ the "Cour de cassation" quashed the decision of a lower court because it did not enquire whether the buyer was a professional person in the same line of business before holding an exclusion clause inapplicable. Furthermore, because the 1978 legislation on standard contracts makes a clear distinction between consumer and commercial contracts, it is reasonable to expect the courts to follow suit.

(c) Transport contracts:

Article 103 of the "Code de commerce", modified by the "loi Rabier" of 17th March 1905 expressly prohibited the inclusion of clauses excluding all responsibility with respect to the loss or damage of goods, and *a fortiori*, personal injury. Limitation clauses on the other hand are allowed subject to the overriding provision that there is no deceit (including misrepresentation) in the formation of the contract, nor an intentional fault (*faute dolosive*) in the performance of the contract. In this case however, a serious fault is not enough to preclude the application of a limitation clause. That was the position taken by the "Cour de cassation" in 1932.⁽³⁹⁾ In this area,

38. Cass. com. 18 juillet 1975, D.R.P.C. Lemarchand, inédit.

39. See Civ. 3 août 1932, D. 1933 1. 49 note Josserand. A more recent decision has taken the same position. Com. 26 juin 1972, D. 1972 607. Bull. Civ. iv no. 204.

there are numerous ministerial orders which fix the minimum amount any limitation clause may stipulate.

The problem that often arises concerns cases where the amount provided for by the limitation clause or a ministerial order is derisory in comparison with the actual damage suffered by the innocent party. Before 1950, the courts held that, because the law of 1905 was designed to protect users of commercial transport from unfair practices by the operators, such a clause should be treated like an exclusion clause and declared a nullity.⁽⁴⁰⁾

This manner of interpreting limitation clauses was changed by the "Cour de cassation" in 1951.⁽⁴¹⁾ In that case, a carrier lost clothes belonging to the plaintiff. A ministerial order had fixed minimum compensation in the event of damage or loss of the goods which in the instant case was fixed at 140 francs. The carrier, who had a limitation clause in his contract, offered to pay this amount. The lower court held that the amount was too small in comparison with the actual loss and refused to apply the clause.

The "Cour de cassation" overruled the lower court. Their ground for doing so was that the consignor had a choice between declaring the value of the goods and entering into a special contract with the carrier, or sending the goods without declaring their value in which case he was bound by the limitation clause. The consignor had chosen the latter; hence he was bound by the clause. The "Cour de cassation"

40. Rodière: "La validité des clauses limitatives de responsabilité dans les transports terrestres" D. 1955, Chronique xxi p. 123; See Civ. 12 juillet 1923 D.P. 1926, I.229 Paris, 3 mai 1949, D. 1950 283, Colmar 24 nov. 1950, D. 1951, 150.

41. Com. 4 juillet 1951, Bull transport 1951, 559.

felt that in the former case, the contract price would be much higher than in the latter case. The risk of receiving much reduced compensation was, the court said, the price paid for the lower contract price the consignor paid.

The position therefore seems to be that in dealing with a limitation clause in a carriage of goods (by land) contract, two situations must be distinguished.⁽⁴²⁾ Where the carrier gave the consignor the opportunity to choose between contracting on a special contract basis or on a limited liability basis, the clause applies, irrespective of the smallness of the compensation it stipulates. If on the other hand no alternative is given (as is the case in the great majority of standard contracts), then if the compensation imposed by the clause is derisory, the clause will be treated as an exclusion clause and denied all validity.⁽⁴³⁾

The bailment of goods with innkeepers or hotel proprietors:

French law has been, in comparison with English law, a lot more severe on innkeepers. Article 1953 of the Civil Code, amended by Law No. 73-1141 of Dec. 24th 1973, article 2 states that: "They [innkeepers and hotel proprietors] are responsible for theft or damage to such effects [clothes, baggage etc.] whether the theft was committed or the damage was caused by their domestics and employees or by strangers going in and coming into the hotel."

42. Rodière, note 42: supra, p. 126. Starck, note 15, supra at 51 and 52.

43. Whether a sum is derisory or not is determined objectively, i.e. it is compared to the value a reasonable carrier would put on the goods.

"Such responsibility is unlimited, notwithstanding any clause to the contrary, in case of theft or deterioration of objects of any nature deposited in their hands or which they refused to receive without legitimate reason."

"In all other cases, damages due the traveller are, to the exclusion of any agreed lower limitation, limited to the equivalent of 100 times the price of rental of lodging per day, except when the traveller demonstrates that the harm which he suffered resulted from a fault of him who sheltered him or of persons for whom the latter is responsible."

This new formulation of article 1953 is self-explanatory. The French legislator has made it virtually impossible to opt out of the legal liability imposed on innkeepers and hotel proprietors. Even before the legislator intervened, the French courts made it extremely difficult for any exclusion or limitation clause to apply. (44)

It is very clear that in the end, English and French law have traditionally sought to protect adhering parties from the harsh terms inserted by the business community in their standard contracts. English law has not always clearly stated its premises, hence it has opted for devices such as the doctrine of fundamental breach or other interpretative devices and the result has been that there has not been a distinction between purely consumer transactions and commercial ones, a distinction which is fundamental to the issues involved.

44. See for example, Trib. civ. Seine 4 janvier 1930. Gaz. Pal. 1930, 1 536; Trib. Inst. Cannes 12 juillet 1963.

French law has been more undisguised in its approach, which has led to a greater degree of consistency in the courts. Furthermore, there has been more legislative intervention in this area.

D: Penalties and Forfeitures:

Businessmen have not limited themselves to exclusion and limitation terms in their desire to shift most contractual risks on the persons who deal with them. Penalty and forfeiture clauses are designed to forestall the problem of assessment of damages in the event of a breach of contract by one of the parties. With the growth of hire purchase transactions penalty and forfeiture clauses are now a major means by which parties with superior bargaining power have exploited such power to drive hard bargains in their standard forms.

1 The Position in English Law

For centuries, the courts have traditionally exercised control over these clauses.⁽⁴⁵⁾ Their approach has been to distinguish between penalties and liquidated damages. A penalty clause is one which attempts to enforce performance of the contract by providing for "a payment of money stipulated as in terrorem of the offending party".⁽⁴⁶⁾ A liquidated damages clause on the other hand "is a genuine attempt by the parties to estimate in advance the loss which will result from

45. Swan & Reiter, Contracts, Cases, Notes & Materials. (Butterworths, Toronto, 1978), 6-117.

46. Dunlop Pneumatic Tyre Co. Ltd. v. New Garage, [1915] A.C. 79.

the breach.⁽⁴⁷⁾ The courts have not however been consistent in stating the basis of this distinction.⁽⁴⁸⁾

The modern law on this subject was stated by the House of Lords in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage Motor Co. Ltd.*⁽⁴⁹⁾ The appellants in this case entered into a contract with the respondents in which the latter agreed to sell the appellants' motor-tyre covers and tubes and also bound themselves by a clause not to sell to third parties at less than the current list price issued by the appellants. Clause 5 of the agreement was as follows: "We agree to pay Dunlop Pneumatic Tyre Company Ltd. the sum of £5 for each and every tyre, cover or tube sold or offered in breach of this agreement, as by way of liquidated damages and not as a penalty". The respondents, in breach of contract, sold items at under the current list price. The House of Lords, reversing the Court of Appeal, held that the clause was not a penalty. Lord Dunedin formulated four rules of construction for the purpose of distinguishing a liquidated damages clause from a penalty clause. The mere use of the words "liquidated damages" or "penalty" was inconclusive and it was for the court to find out the real intent of the parties by construing the contract as a whole. He said:⁽⁵⁰⁾

a "It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that will conceivably be proved to have followed from the breach".

47. Treitel, note 11, supra, p. 736.

48. See Legh v. Lillee [1860] 6H & N. 165. Wallis v. Smith, 21 Ch. D.243.

49. [1915] A.C. 79.

50. Note 51 supra at pp. 87-88.

b "It will be held to be a penalty if the breach consists only in paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid".

c "There is a presumption (but no more) that it is a penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage".

d "It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequence of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the bargain between the parties".

In the instant case, the House of Lords felt that not only was the stipulated sum not extravagant, but also that the precise damage caused by the breach of the price maintenance agreement was uncertain. It was therefore most likely that the clause was intended as a liquidated damages clause.

In the *Suisse Atlantique case*,⁽⁵¹⁾ one of the grounds of appeal was that the clause which imposed damage payments of £1000 per day was a penalty clause which ought therefore to be excluded from the contract. The House of Lords held that it was a liquidated damages clause, no doubt because the amount was even less than the amount which an ordinary

51. Note 85 supra.

assessment of damage would have awarded. Hence, the clause was not designed to act *in terrorem*.⁽⁵²⁾

In the Canadian case of *H.F. Clarke Ltd. v Thermidaire Corp. Ltd.*⁽⁵³⁾ no fixed sum was stipulated to be paid by the company in breach. The clause provided that an amount equivalent to the gross profits of a company was payable as liquidated damages. This amount proved to be exorbitant and the Supreme Court of Canada held that the clause was a penalty, and not a liquidated damages clause.

Forfeiture clauses have similar objects to penalty clauses, i.e. essentially to enforce the performance of the contract. In this case, a deposit is paid on the understanding that goods or deposit will be seized if the purchaser, hirer or other does not complete the contract, or if he breaches any of the terms. Forfeiture clauses are especially common in hire-purchase contracts.⁽⁵⁴⁾

In *South Bedfordshire Eleotrical Finance Ltd. v. Bryant*,⁽⁵⁵⁾ there was a hire-purchase agreement in respect of a cold-room. On the hirer falling into arrears with his payments, the owners obtained judgement for the amount due to them; but when the judgement-debt was not satisfied, they sued for possession. The Court of Appeal held that they were entitled to possession since the first action, being for instalments due, did not transfer the property in the cold room to the hirer. Greer L.J.

52. *Cellulose Acetate Silk Co. Ltd. v. Widnes Foundry [1926] Ltd.* [1933] A.C. 20

53. [1974] 54 D.L.R (3d) 385.

54. The common law position has been substantially changed by Statute; for example, the Hire Purchase Act 1965.

55. [1938] 3 All E.R. 580.

said:⁽⁵⁶⁾ "This is an unfortunate case, and if we were entitled to exercise our judgement by reason of our sympathies with the unfortunate defendant, who may have to pay, or have judgement given against him for the full amount of all instalments, and at the same time is called upon to return the goods ... we might think there was a great deal to be said for the unfortunate defendant. Having become liable to pay under a judgement every one of the instalments provided for in the contract, he is now asked to deliver up the goods to which, if he had effectually paid all the money, provided for by the agreement, he would have become entitled as the owner. Unfortunately however, we have merely to consider the agreement between the parties having regard to the facts that were before the judge." This passage is worth quoting because it is demonstrative of the harshness of certain forfeiture clauses and also of the helplessness of the judges in dealing with it squarely, because of traditional legal views in this connection.

However, less than twenty years later,⁽⁵⁷⁾ Denning L.J. (as he then was), and Somervell L.J. said that in such circumstances (as above), there is an equity of restitution in favour of the party in breach which could enable him to recover his deposit. They maintained that this depends on whether it is unconscionable to allow the other party to keep the deposit. If a court can intervene and invalidate a forfeiture clause in a hire-purchase contract where there is only an option to purchase, then it can, a fortiori, do the same in a contract of sale.

56. note 57 supra at p. 581.

57. Stocklosser v. Johnson [1954] 1 Q.B. 478

II The Position in French Law:

Whereas English law has for a long time made a distinction, at least in theory, between a clause imposed in terrorem against one of the contracting parties, and a liquidated damages clause; French law treated all clauses which imposed any sum of money to be payable or forfeited on breach by one of the parties on the same footing, i.e. they were valid. Their validity was entrenched by article 1152 of the Civil Code of 1804 which stated that "When an agreement provides that he who fails to execute it shall pay a sum certain by way of damages there may not be awarded to the other party a greater or lesser sum." At the time the Civil Code was elaborated, that position taken by article 1152 was novel because before then the weight of opinion among French jurists was that judges could intervene and reduce the so-called liquidated damages if they were in reality penalties which were manifestly over and above what was required to indemnify the creditor in the event of a breach by the debtor. This view was particularly upheld by Pothier. Pothier thought that the penalty clause ("clause pénale"), is inserted in contracts so that the creditor might be adequately compensated in the event of non-performance;⁽⁵⁸⁾ a view endorsed by article 1229 of the Civil Code. Pothier therefore reasoned that if the damage suffered was less than what the penalty clause stipulated, the judge had to intervene and reduce the latter. If a promisor consented to a penalty clause which was clearly in excess of the real damage, Pothier felt that such consent was given in error, and therefore invalid.

58. Pothier, *Traité des Obligations*, rééd. Paris, 1813, t 1 no. 346.

59. Jean Thilmann: "Fonctions et Révisibilité des Clauses Pénales en Droit Comparé", *Rev. Int. de dt comparé*, 1980 p. 17 at p. 19.

The Civil Code however took a different view and denied judges the power to review penalty clauses because effect had to be given to the agreement reached by the parties to the contract in accordance with the then prevailing principle of "Autonomie de la volonté". Furthermore, the French legislature did not at that time, trust the magistracy enough to confer upon them the task of controlling contracts privately made. (60)

If this approach to the problem of penalty clauses was necessary at the time, its weaknesses, or rather its failures, soon became apparent as from the beginning of the twentieth century. Standard form contracts gave the opportunity for businessmen to insert draconian penalty clauses, with the knowledge that few, if any, persons would pay any particular attention to such clauses, especially in credit contracts and hire-purchase transactions. Indeed, penalty clauses become what one commentator has described as: "l'instrument de tyrannie des groupes et des puissances financières en mesure de mobiliser et même de monopoliser toutes les ressources d'un système juridique". (61) In the face of this contractual terrorism, first instance judges naturally sought for ways to avoid the harshness of the rule in article 1152 of the Civil Code. The first means by which they attempted to do this was by applying article 1231 which stated that: "When the engagement has been executed in part, the agreed penalty must be diminished by the judge in proportion to the interest which the partial execution procured for the creditor, without prejudice to the application

60. Fenet, Recueil complet des travaux préparatoires du Code civil, Paris 1827-28, t xiii, procès verbaux de la séance du 11 brumaire an xii, p. 57.

61. Cornu G. obs. Revue. Trimestrielle de Droit Civil, 1971, p. 167.

of article 1152".

This attempt at avoiding the harshness of art. 1152 did not find favour with either the legal scholars nor the "Cour de cassation" who thought that in many instances, there could not be any partial performance.⁽⁶²⁾ The "Cour de cassation" always found that the parties to the contract did not contemplate the possibility of part performance,⁽⁶³⁾ hence article 1231 was inapplicable in most cases. Secondly, article 1231 could be excluded by the parties to the contract. It was not necessary to exclude it specifically for any clause which provided that the penalty was payable "pro-rata" to the extent of part-performance was construed as excluding the possibility of judicial review of the contract.⁽⁶⁴⁾ The scope of article 1231 was thereby extremely limited.

Other attempts were made to circumvent the effect of article 1152. These attempts were quickly stifled by the "Cour de cassation" because they went against the principle laid down by the legislator in article 1182 of the Civil Code.⁽⁶⁵⁾ The concept of natural justice and fairness was raised in some cases. The absence of "Cause", and the concept of abuse of rights were also used without success.⁽⁶⁶⁾ Judges could only succeed in avoiding penalty clauses where such clauses were

62. Monsieur Bey, "Les Aspects Juridiques de la Convention de Crédit-Bail mobilier", L.C.P. éd C.I. 1-28 août 1969, 86634. See Cass. com. 14 avril 1972 J.C.P. ed. CI 6 juin 1974 11407.

63. Jean Thilmany, not 61 supra at p. 28.

64. See Bruno Boccara, "La Réforme de la Clause Pénale: Conditions et Limites de l'Intervention Judiciaire", Semaine Juridique 1975, 1, 2742 No. 3.

65. See Cass. 23 mai 1940, D.S. 1940 pp. 161-162; Cass. 21 octobre 1974, D.S. 1972 p. 782; V.E. Alfandari, "Le Control des Clauses pénales par le Juge", J. C.P. 1971, 1. 2395.

designed to circumvent usury laws.⁽⁶⁷⁾ This last option had a very restricted latitude because it was only applicable in purely monetary loan contracts. It did not extend to hire-purchase or other contracts.⁽⁶⁸⁾

Because the courts could do very little, if anything, to lessen the inequalities of penalty clauses, there were clamours particularly by consumer associations and legal scholars for the legislature to act. In 1975, the war of attrition against penalty clauses by jurists ended in reforms enshrined in the Law of 9th July 1975 [Loi No. 75-597 du 9 juillet 1975]⁽⁶⁹⁾, which modified articles 1152 and 1231 of the Civil Code on penalty clauses. Article 1 of the new law, which complemented the original article 1152, states that: "Nevertheless, the judge may moderate or increase the penalty which had been agreed, if it is manifestly excessive or pitiful. Any contrary stipulation will be considered not written". Article 2 of the new Law also adds: "Any contrary stipulations will be considered not written", to article 1231 of the Civil Code.

In view of the fact that article 1152, as modified, has now given the judges powers to intervene and modify manifestly excessive or pitiful clauses, article 1231 is no longer of much relevance. However, while the new article 1152 requires the penalty to be manifestly excessive

67. Trib. corr. de Dunkerque, 25 janv. 1963; D. 1963, Som. 76; Trib. com. Seine, 24 oct. 1967; L.C.P. 68, II 15450.

68. T.L. Evade "La réduction des clauses pénales excessives", Gaz. Pal. 1976, doctrine, p. 450.

69. See Carbonnier, note 16 *supra* at no. 79; Cornu, note 63 *supra*; Alafandri note 67 *supra*. Loi No. 75-597 du 9 juillet 1975, L.C.P. 1975, III 43664.

or pitiful, this is not a requirement of article 1231. All that is required in this case is part performance.

The question has been asked whether the new laws empty penalty clauses of their comminatory effect. Boccara thinks ⁽⁷⁰⁾ not for the following reasons: First of all, because the penalty has to be manifestly excessive, Boccara thinks that penalty clauses still have a deterrent effect. Hence, in reviewing penalty clauses, judges must still maintain a considerable difference between the amount of the penalty clause and the actual damage incurred. This contention is difficult to appreciate if, as it were, the new legislator's target was the elimination of unfairness by the business community vis-à-vis the consumer population. Indeed that contention is not borne out by the cases decided subsequent to the new legislation.

A case study of cases on penalty clauses brought within the first fifteen months of the new law ⁽⁷¹⁾ show that 109 cases were brought in the High Court of Paris ('Cour de Paris'). This fact, i.e. that only 109 cases were brought in this connection, allayed fears that the courts were going to be inundated with pleas to review the clauses by consumers. Of these 109 cases, all of which were brought for the reduction of the penalty, the courts declined to reduce the penalty in only 26 cases. Hence in more than 75 per cent of the cases, the amount was reduced. Among the 83 cases in which there were reductions, the reduction was by at least half of the amount stipulated in the penalty clause.

70. Boccara, note 64 *supra*, no. 2.

71. Nectoux: "La Révision Judiciaire des clauses Pénales", J.C.P. 1978. 2. 2913.

Nectoux further found that the type of contracts which the legislature desired to affect most, hire-purchase and other hire contracts were in the lead in numbers, of all the cases which were adjudicated upon and in which the court reduced the penalty. Most of the cases were founded upon article 1152 and not 1231. The criteria on which the judges based their reductions were various. Prominent among them were the actual damage incurred by the promisee; in hire contracts, the residual value of the goods hired; the possibilities open to the promisee in getting a new contract. Judges have made overt references to principles of equity and good faith. The Cour de cassation has held that in modifying a penalty clause, the judge must indicate by how much the clause is manifestly excessive or pitiful. ⁽⁷²⁾ Although a judge must not necessarily limit the penalty clause to the actual damage incurred, this is a criterion which is particularly taken into consideration; especially in consumer contracts.

This new French law approach, it is humbly submitted is highly commendable. It makes it unnecessary to draw the often very tenuous distinction between penalty and liquidated damages clauses as in English law and instead, seeks to reduce the amount stipulated if and when it is considered to be excessive; conversely, to increase it if it is adjudged to be pitiful.

72. Cass. civ 3^eR. 17 janvier 1979, J.C.P. 1979 IV 98.

Conclusion:

The above discussion has attempted to demonstrate the ways by which English and French courts have grappled with the problems of standardized contracts. Certain doctrines are common to both. They have both fashioned strict rules in connection with the incorporation of terms into contracts, the French rules being much stricter than their English counterpart.

The English doctrine of fundamental breach which was for decades, the most important "tool", in addition to strict construction, for controlling unfair exclusion or limitation clauses has been riddled with inconsistencies as the cases have shown. The French law concepts of "faute lourde" and "faute dolosive" have been the principal tools for invalidating unfair exclusion and limitation clauses. On the whole, their applications, especially with regard to sale of goods contracts and transport contracts, have been much more consistent than the application of the doctrine of fundamental breach in the English courts. Nevertheless, like the latter, they have proved rigid, and consequently, their application has extended to contracts which are not by any means unfair.⁽⁷³⁾

The failure by both the French and English courts to state categorically their reasons for intervention is attributable to the fact that lip service is at least being paid to the classical paradigm of contract which as Chapter Two demonstrated, no longer holds sway.

73. See Cass. com. C. partielle, 28 avril 1980, Sem. Jus. 1980, IV. 263, Harbutt's Plasticine v. Wayne Tank & Pump Co. Ltd. [1970] 1 Q.B. 447.

The next chapter will examine to what extent the Cameroonian courts, whose contract law is basically derived from French and English law, have also dealt with the problem of standardized contracts.

The view will be put forward in Chapter Five, that the notion of "unconscionability" provides the most satisfactory basis for intervening in contracts. Unless the unconscionable aspect of standardized contracts is given explicit recognition by the courts, their treatment will continue to be plagued by uncertainties and inconsistencies.

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CHAPTER FOUR.

THE JUDICAL TREATMENT OF STANDARDIZED CONTRACTS IN CAMEROON

It has already been pointed out in the introductory chapter on the legal framework of Cameroon that the law of contract in Cameroon is derived from French and English law and also that there is a dearth of local legislation in this area of the law. The purpose of this chapter is to see how the Cameroonian courts have dealt with standardized contracts, with particular emphasis on how and to what extent they have taken into consideration the economic and social conditions that exist in the country.

Section I: Particular Problems Arising in Cameroon:

Standardized contracts, it has been seen, are a spin-off of the growth of large scale enterprises and the upsurge in "consumption". In this light, some may cast doubts on the idea of discussing standardized contracts within the context of a developing country such as Cameroon. The point has however been made that "consumption patterns" in Cameroon differs from those in any developed country merely in scale, and not in essence.⁽¹⁾ Standardized contracts are therefore as much a reality in Cameroon as they are in France for example. Indeed, the problems posed by standardized contracts come across much more starkly in Cameroon than they do in any developed country in as much as their existence,

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which is largely due to a change in the nature of contract, has not been matched by a similar change with respect to other social realities.

Before embarking on a study of the judicial treatment of these contracts, one further point ought to be made. Such a study is severely handicapped by the total absence of any proper law reporting in Cameroon. This factor renders any comprehensive review of the decisions of the courts an uphill task. This is further complicated by the fact that there are seven Courts of Appeal in the country at the moment, five in the French Law jurisdictions, i.e. the French speaking part of the country, and two in the common law jurisdiction, i.e. the English speaking provinces of the country. This factor, coupled with the fact that there is no strict adherence to precedent in Cameroon makes it difficult, to say the least, to determine exactly what the courts will decide in any given case.

A: The problem of Illiteracy:

Illiteracy is a problem which affects nearly eighty per cent of Cameroonians. Because more often than not, standardized contracts are in written form, illiterate persons are evidently prejudiced. This problem is not peculiar to Cameroon and it is prevalent in most of Africa. However, unlike many other African countries,⁽²⁾ Cameroonian courts have demonstrated an acute lack of sensitivity in this respect: no

2. See E.I. Nwogugu, "An Examination of the Position of Illiterates in Nigerian Law," 1968-69 Journal of African Law, p. 32. Also, S.K. Date-Bah, "Illiterate Parties and Written Contracts," 3 Review of Ghana Law (1971), p. 181.

legislation for the protection of illiterates exists in Cameroon and as the cases will show, considerable risks of the misrepresentation of standardized terms to illiterate contracting parties exist.

In French law, there are no provisions to deal with such a situation. In English law, the case of *Thompson v. L.M. & S. Railway Co.*⁽³⁾ is often cited as authority for the proposition that an illiterate person is bound by a written contractual document. This case, however, dealt only with the application of an exclusion clause. In that case, the plaintiff, an illiterate lady, bought a railway excursion ticket, a condition of which referred to the company's timetables and notices which excluded liability in respect of any injury to the plaintiff, however caused. The plaintiff pleaded her illiteracy at the trial but the Court of Appeal held that it was immaterial and did not affect the legal consequences of the exemption clause.

In the Cameroonian case of *Direct Suppliers Co. Ltd. v. Dairu Kila*,⁽⁴⁾ the appellants were dealers in agricultural produce and the respondent, an illiterate farmer. - The latter supplied the former with a quantity of coffee, worth about £200 and was issued with a printed receipt in standard form. One of the clauses appearing on the receipt was an acknowledgment that the price for any produce supplied had been paid. The respondent was made to thumb-print a duplicate copy of the receipt with a representation by the respondent's agent that the receipt would be withdrawn when payment for the coffee was made. In an action for the price, the appellant contended that the receipt was clear evidence that payment had been made.

3. [1930] 1 K.B. 41.

4. Civ. Appeal No. BCA/23/74 of 28th Nov. 1974, Court of Appeal, Bamenda (unreported).

The High Court of Bamenda (in the English speaking part of the country) held that the contents of the receipt had been misrepresented to the plaintiff who was therefore not bound by the afore-mentioned clause. This decision was affirmed by the Court of Appeal of Bamenda. By deciding the case on the grounds of misrepresentation, the Bamenda Court of Appeal shirked the responsibility of determining what measure of protection the courts ought to give to illiterates in such circumstances.

In another case however, *Ukpai Meeka v. AGIP (Cameroon), S.A.*,⁽⁵⁾ the situation was different. In that case, the plaintiff was an illiterate person who ran a small retail business. The defendants were distributors of petroleum products. In 1967, they entered into a standardized contract whereby the plaintiff would operate and manage the defendant's filling station. Articles 5(1) and (2) of the contract stipulated that the dealer, i.e. the plaintiff, would run the business with products exclusively supplied by the defendants and would pay cash for such products. Article 6 provided that the plaintiff would pay two hundred thousand francs as a refundable guarantee. Plaintiff made an initial order of five hundred thousand CFA francs (about one thousand pounds) worth of products. After subsequent dealings, the plaintiff brought an action claiming that he had erroneously paid the sum of five hundred thousand francs into the defendant's account which the defendants refused to refund. At the trial, after reviewing the facts and evidence of the case, the judge in giving judgment for the defendants, said apologetically: "It would seem that the plaintiff has all along been under a terrible misapprehension as to his

5. Suit No. HCSW/56/74, High Court, Buea (unreported).

dealings with the defendant in regard to the initial order which he has placed. The plaintiff is illiterate and this unfortunate condition is without doubt the cause of his misapprehension."

Hence, in spite of the judge's avowal that illiteracy was the cause of the plaintiff's misapprehension of the contractual terms, there was no question, barring fraud or misrepresentation, of giving him any relief whatsoever.

Related to the problem of illiteracy is that of entering into a contract written in a language alien to a contracting party, a problem which recurs constantly in as much as there are two official languages in Cameroon; French and English. An example of this situation is the case of *Olabi Favez v. Cie. Industrielle d'Automobile du Cameroun*.⁽⁶⁾ The plaintiff entered into a contract with the defendants for the purchase of a new car. Having paid about half the cost price of the car, he was made to sign a form printed in French - a language he could not read - which was headed "Demande de Financement d'un Véhicule". The plaintiff understood this to be a hire-purchase agreement. In fact, the form was an application for a loan to be raised on a Parisian bank. The loan could not be raised because the bank would not accept the defendants as guarantors. When he did not obtain delivery of the car, plaintiff brought an action against the defendants for breach of contract. The trial judge found as a fact that the plaintiff entirely misunderstood the standard form contract because it was written in a language he did not understand. Nevertheless,

6. Suit No. HCSW/4/73, High Court, Buea (unreported).

he went on to hold that that fact was of no moment in deciding the case. Although similar difficulties may also be prevalent in negotiated contracts, the absence of dickering in standardized contracts aggravates the problem. Peasants who have little understanding of complex transactions are particularly vulnerable to such difficulties. This problem is not prevalent in England or France (although it must be pointed out, the recent influx of immigrants, particularly from the Indian sub-continent in England, who are illiterate in English points to the fact that this may be an emerging problem even in these countries). Hence guidance in this connection can only be had from other African countries with similar problems. In Nigeria where there is legislation designed to protect illiterates, the courts have taken a more realistic approach to this problem. In one old case, *Otegbeye v. Little*,⁽⁷⁾ agents of the plaintiff, entered into a contract with a steamship company for the carriage of his kola nuts. The contract contained an exemption clause. In an action for the loss of his goods, the defendants pleaded the exemption clause. The court, however, found that the agents of the plaintiff were illiterates, who could not read the receipt. The court held, therefore, that the defendants "had in this country [not] done all that they could reasonably be expected to do" to bring the exemption clause to the notice of the plaintiffs' agents. Similarly, in Ghana, since the Privy Council decision in *Kwamin v. Kufuor*,⁽⁸⁾ where it was held that the fact of a party's illiteracy should be taken into consideration in determining whether a contract should bind that party, a number of decisions have been taken by Ghanaian courts on those lines.⁽⁹⁾

7. [1907], I.N.L.R. 70 Cited in Nwogugu E.I., note (2) *supra* at p. 46.

8. [1914] 2 Ren. 808, cited in S.K. Date-Bah, note (2) *supra*, at p. 185.

9. See also U.T.C.V. Tetteh, [1965], unreported in Date-Bah, *supra*, at p. 187.

In an article on the treatment of exemption clauses by Sudanese courts, Zaki Mustapha⁽¹⁰⁾ points out that the Sudanese courts have generally been inclined to follow the English decision of *Thompson v. L.M. & S. Railway Co.* He however submits that that decision was predicated on two grounds. First of all, he contends that implicit in the Court of Appeal's judgment, there was an assumed business awareness which should have led the plaintiff to realise that excursion tickets were generally accompanied by exclusion clauses. Secondly, the Court of Appeal took into consideration the general standard of education in England at the time of the decision was given. He contends that those factors should also be considered by Sudanese courts in connection with contracts involving illiterates. Date-Bah for his part,⁽¹¹⁾ submits that the Ghanaian courts should apply the principle of good faith in such contracts and invalidate contracts in which an illiterate party has not had the contractual terms explained to him. Concrete proposals in this connection will be reserved for a later chapter. It is, however, obvious that the stance taken by Cameroonian courts in the above cases is clearly inadequate because they have merely evaded the problem altogether as if it did not exist. Curiously however, the plea of 'non est factum' was not raised in any of these cases. While that plea may apply in certain circumstances it is clearly not adequate since it is applicable only when a party is mistaken as to the class and character of a document, and not as to the specific contents of the contract.

10. Zaki Mustapha, "Exemption Clauses in Sudan Courts", 1967. J.A.L. 119 at 121-135.

11. Date-Bah, note (2) supra, at p.186.

B: The Problem of Business Awareness:

While the problem of illiteracy is indeed acute as demonstrated above, it is by no means the only major problem. The lack of consciousness on the part of the majority of Cameroonians with respect particularly to consumer issues is another problem. That this area of the law constitutes an ever growing problem is incontrovertible as a few of the cases suggest. However, because most consumers are not conscious of the legal implications of the contracts they enter into daily, the level of litigation concerning such contracts is very low. The reasons for this state of affairs are manifold. Prominent among them is the fact that because the claims involved in consumer litigation are more often than not relatively small, and also because consumers have to deal with very large companies, often para-statal institutions, there is an understandable reluctance to resort to litigation. This problem is not peculiar to Cameroon. In the words of one commentator⁽¹²⁾ on this subject, "probably the greatest danger posed to consumerism in Nigeria is that most people are not aware of the dangers involved in being indifferent...". He points out that it is only recently that consumer problems have been considered important.

Section II: Judicial Treatment of Specific Standardized Contracts:

Because standardized contracts cover a wide gamut of contracts, only important types of contracts will be examined. These are credit and hire-purchase contracts; contracts involving the sale of agricultural produce;

12. Kwesi Essien, "Consumer Protection in Nigeria: The Case for Reform." Unpublished paper presented at the Annual Law Teachers Conference, at the Ahmadu Bello University, Zaria, 8-11th April 1981.

sale of goods and service contracts. One major area, insurance contracts have been omitted because they present particular problems.⁽¹³⁾

A: Credit Contracts.

Three principal types of credit contracts can be discerned in Cameroon which are entered into on the basis of standardized contracts: Business credit, the bulk of which is accounted for by the commercial banks and also the Cameroon Development Bank; agricultural credit, the outstanding lender for which is the National Fund for Rural Development (FONADER), and consumer credit, for which the commercial banks are the main lenders.⁽¹⁴⁾

In addition to these principal lending institutions, there are other private lenders whose operations account for a significant share of the overall credit transactions such as credit unions and private money lenders. Some of them, such as the credit unions come under government regulation. The majority of them (individual money lenders) cannot however be regulated otherwise than by blanket usury laws. Because of the short supply of credit in comparison with the ever increasing demand for it, such legislation is usually ineffective in as much as it is difficult to enforce. Many borrowers, particularly in the rural areas, have no options than to resort to illegal loan agreements with loan-sharks. Curiously, however, hardly any significant disputes arising from such contracts do reach the courts. One can only surmise that because of the illegality of these contracts, the parties always find an extra-judicial means of settling any disputes that arise.

13. See Fonkam, S.A.: State Regulation of Private Insurance in Cameroon, Unpublished Ph.D. thesis, University of London, 1981.

14. See Chapter One for an outline of these institutions.

Unfair contract terms or practices are, however, not limited to private money lenders as an examination of a few of the standardized terms of a few of the recognised lending institutions will indicate.

The law relating to credit contracts in Cameroon is essentially the law of contract as applicable in the anglophonic and francophonic provinces. The Ordinance No. 73-27 of 30th August 1973 regulating banking activities in Cameroon deals predominantly with the setting up of banking institutions and does not deal with banker and customer relationships. It is not therefore germane for the present purpose. Hence the general law of contract is what is applicable.

The contracts entered into between the National Fund for Rural Development (FONADER) and farmers are particularly important not only because they affect a great number of persons, but also because of their impact on the economic development of the Cameroon - agriculture being the mainstay of Cameroon's economy. The fairness of some of their terms must surely be disputable.⁽¹⁵⁾ Article 9(d) of their General Conditions of Contract stipulates that any-tax, charge or fiscal duty however arising in connection with any credit contract must be borne by the borrower. Article 12 provides that if FONADER is compelled to resort to litigation in connection with any of its credit contracts, it would exact a penalty equivalent to fifteen per cent of the total amount of the loan. It is noteworthy that this clause binds the other party irrespective of the actual amount of the loan that remains outstanding. Hence, even if ninety per cent of the loan has been repaid and FONADER brings an action to

15. FONADER: Conditions Générales d'Ouverture de Crédit du FONADER, Yaoundé.

recover the remaining ten per cent, the clause means that fifteen per cent of the total loan will be paid as a penalty, i.e. more than the outstanding sum.

In one case decided in the Yaounde High Court (i.e. in the French-speaking jurisdiction),⁽¹⁶⁾ the initial loan granted to the defendant was 3,300,000 CFA francs, and the amount repayable, including interest, was 3,729,565 CFA francs. The defendant defaulted in the repayment of the loan and FONADER, the plaintiff, brought an action claiming 4,554,536 CFA francs which included the fifteen per cent penalty. The Court gave judgment to FONADER for that amount even without discussing the validity of the fifteen per cent penalty. It was seen in the last chapter that although the French courts generally refused to interfere with penalty clauses, since the passing of the Law No. 75-597 of July 1975, French courts are empowered to modify penalty clauses. However, because this law is not applicable in Cameroon, the courts which follow the French law tradition do not interfere with penalty clauses. Such a case has not yet come up for adjudication in English speaking provinces but one can only speculate, on the basis of their treatment of forfeiture clauses in hire-purchase contracts to be discussed later, that the result would be the same; although English law clearly draws a distinction between a liquidated damages clause and a penalty clause, enforcing the former and not the latter.

Another clause, article 25 of the same general contract conditions reserves to FONADER the right to suspend unilaterally any credit contract. Such a one-sided right of withdrawal from a contract could put the other

16. Affaire Mme. Edoa Marie, 27 Nov. 1980, Trib. de 1^{ère} Instance Yaounde (unreported).

party in a quandary and it is submitted that it ought not to be validated by the courts. When, in an interview with the Director of Credit (in June 1981), I put it to him that those clauses were overtly very onerous on the company's customers, he replied that such measures were necessary in order to deter most borrowers from breaching their contracts, particularly with regard to the non-repayment of loans.

One aspect of FONADER'S standardized contract that has often been challenged in the courts is their guarantee clause. The clause provides that the surety will be bound to pay FONADER any sum that the principal debtor fails to pay however such default.

In *affaire Eboumbou Moudam*,⁽¹⁷⁾ a case decided in the French-speaking part of the country, the borrower defaulted in the payment of part of the loan. After receiving judgment for the debt, FONADER immediately proceeded to impound the surety's goods in order to satisfy the debt, whereupon the surety brought this action against FONADER, contending that because his liability was secondary, FONADER had to seize the debtor's goods before his. The Yaounde High Court found for the plaintiff, holding that only when a seizure of the debtor's goods could not satisfy the debt should FONADER proceed to seize the surety's goods as well.

Because of this judgment, officials of FONADER are seeking to modify their standard terms so as to give themselves the right to seize a defaulting debtor's goods or those of his sureties even without obtaining a court order to that effect. Such a term is already inserted in the standard contract form of the Cameroon Development Bank. The latter

17. Trib. de Grande Instance, YAOUNDE, 1980 (unreported).

possesses its own agents who, on default by any of its debtors in repaying a loan, simply seize the debtor's goods or those of his surety in order to satisfy the debt. Although the Bank asserts that this term is designed to facilitate debt recovery, it is submitted that it is too oppressive to be allowed to stand. What the term in effect does is to reverse the initiative of bringing actions in debt recovery cases. Instead of the Bank initiating a legal action, it becomes up to any debtor or surety who deems his goods to have been wrongly seized to bring an action before the courts. Considering the difficulties to be faced by any eventual plaintiff in this connection, the chances are that very few indeed would do so, while the great majority would be compelled to settle with the bank on the latter's terms. Judging from the manner the courts have dealt with other unconscionable clauses appearing in the Bank's standard contract form, for example, the penalty clause discussed above, one can only speculate that the provision would be enforced.

Commercial banks also come in for scrutiny as the following cases reveal. In *Mofor Alexander v. Cameroon Bank Ltd., and Others*,⁽¹⁸⁾ a case decided in the English speaking part of the country, the plaintiff was a guarantor in a credit contract between the third defendant and the bank involving three million CFA francs. The contract was concluded in May 1976. In October the same year, the sum of three million, one-hundred and fifty thousand CFA francs was paid into the first defendant's account. The plaintiff therefore considered himself discharged from his obligations under the contract of guarantee. Meanwhile, the third defendant entered into a further contract with the bank whereby he obtained a further loan

18. Suit No. HCB/15/80 of April 22nd 1981, High Court, Bamenda (unreported).

of three million francs. When he defaulted in the payment of this loan, the bank blocked the plaintiff's account on the ground that the term of the original guarantee contract provided that the plaintiff was a guarantor to a running account.

The Bamenda High Court decided that in view of the serious implications of such a term, its implications ought to have been made abundantly clear to the plaintiff. Because that was not done, the court held that the plaintiff had to specifically guarantee the second loan agreement if he had to be bound since his obligations under the first agreement had been discharged when money was paid into the borrower's account in October. In this case, the plaintiff's account with the defendant bank was blocked for two years, causing him great hardship simply because the bank sought to protect itself against loss by all means, however unfair.

A further illustration of this point is provided by the case of *Albert Ngafor v. Cameroon Bank Ltd.*⁽¹⁹⁾ In this case, the plaintiff entered into a contract with the defendants in which the latter granted him overdraft facilities for three million C.F.A. francs. The plaintiff, a small businessman mortgaged a deed - the 'Certificate of Occupancy' (akin to a freehold) on a property of his valued at three and a half million C.F.A. francs, as security for the loan. When on an application for an increase of the loan the defendants refused to grant it, the plaintiff repaid the loan and demanded the return of his 'Certificate of Occupancy' in order to obtain another loan from a different bank. The defendants did not

19. Suit No. HCB/3/79 of January 16, 1981, Bamenda High Court (unreported).

release the deed until six months later when the plaintiff filed this suit against them. Their defence was that one of their standardized contract terms stipulated that no security could be handed back to a client until the bank was satisfied that the client did not owe any of its branches, and that six months was required to check and cross-check the plaintiff's indebtedness towards any of its branches. The High Court of Bamenda held that irrespective of the said term, there was an implied condition that the deed would be returned to the client as soon as he liquidated the debt and that a period of six months was in any event an unreasonably long time to verify the plaintiff's indebtedness towards the bank.

It is obvious, therefore, that the commercial banks are clearly flouting both the French law provisions and the common law provisions on guarantee and suretyship contracts. Article 2021 of the Civil Code applicable in the French speaking part of the country provides: "A surety is obligated toward the creditor to pay only upon the debtor's default, whose assets must first be investigated, unless the surety renounced the benefit of investigation or unless he is obligated jointly with the debtor, in which case the effect of his engagement is regulated by the principles which have been established for joint debts." The effect of FONADER'S contract of guarantee is tantamount to transforming a surety into a joint debtor. Their desire to impose strict conditions on their suretyship contracts is understandable in view of the fact that as the Director of Credit of the above company pointed out, some customers are inclined to default in repaying their loans. However, as the researcher found out,

the company is already very astute in accepting as guarantors only persons who are very likely to repay the loans, such as civil servants and businessmen. In addition they often require real estate and personal chattels to secure loans. Hence there is no real need to make the guarantee contracts as harsh as they appear.

It may also be said that any credit contract involves a certain amount of risks to be undertaken by the lender. However the Cameroonian banks, by using stringent guarantee contracts, and by using very unfair practices in enforcing those contracts, are in effect freeing themselves of all the risks involved and placing the brunt of all the risks on the other parties. This state of affairs sometimes has very adverse consequences on the other contracting parties. In *Affaire Pharmacie Nnam o/BICIC*, a case decided in the French speaking area of the country, a credit contract was entered into between one of the largest commercial banks and a small pharmacy. The bank granted the latter an overdraft of one and a half million CFA francs (about three thousand pounds). Thereafter, without giving the plaintiff any reason, the bank unilaterally rescinded the contract on the basis of a contractual clause giving them a right to do so. The Yaounde High Court however, in holding for the plaintiff, said the clause was invalid, in view of the dire consequences it could and did cause to the plaintiff - putting the latter in a quandary vis-à-vis its suppliers. This case shows, however, that the courts are not altogether insensitive about such problems. However they appear to intervene only when established contract principles are drastically flouted. Otherwise, the credit institutions get their way.

B: Contracts of Hire-Purchase:

Hire-purchase contracts have undergone what may be described as an explosion since the early sixties in Cameroon. They are important for two reasons:- first of all, they are now exceedingly common in Cameroon today and secondly, their subject matter is likely to be an expensive item such as cars or expensive household items such as furniture, refrigerators etc. Hire-purchase contracts were introduced in Anglophonic Cameroon as part of the common law in 1900 and they are still governed by the common law because Cameroon, unlike some other African States, has not yet enacted any legislation on this subject.

In the French speaking part of the country, the French Commercial Code governs hire-purchase transactions which may take the form of "vente à crédit", "location-vente" or "vente à tempérament". As in English law, numerous French decrees which are inapplicable in Cameroon have modified the law of hire-purchase. Hence the legal consequences of hire-purchase is the same in both the French and English speaking jurisdictions as the cases will reveal. Attention will be paid essentially to the unconscionable practice of what has come to be known as "snatch back" in this section.

The fact that hire-purchase transactions have become common in Cameroon has not unfortunately made them any less complex to the majority of Cameroonians. On the contrary, the stronger desire on the part of most Cameroonians to acquire luxury goods, coupled with the astuteness of salesmen who not infrequently misrepresent terms couched in arcane legal language, buried in fine print, make hire-purchase transactions even more

complex today than when they were first introduced. The case of *J. Ngole Mabako v. C.N. Menyoli Motors Enterprises Ltd.*,⁽²¹⁾ illustrates this point. In 1964, the plaintiff entered into a contract for the purchase of a Fiat Saloon car. The contract price was 669,917 CFA francs, of which a down payment of 375,000 CFA francs was made. The defendant's standardized contract terms made it clear that the contract was one of hire-purchase. Later on, while the car was in a garage, the defendant repossessed it because the plaintiff had failed to meet his payments. The plaintiff argued that he signed the contract without appreciating its terms, thinking that it was a simple contract of sale on credit terms. His counsel's submission that hire-purchase agreements were virtually unknown to the local law failed to influence the court.

Hire-purchase is financed in Cameroon predominantly by the commercial banks and by trading institutions. In the case of automobiles, which figure prominently in hire-purchase agreements, there is one company, SOCCA (Société Commerciale de Crédit Automobile) which specializes in financing hire-purchase agreements.

As earlier mentioned, unlike countries such as Nigeria, Tanzania and Kenya, which have enacted legislation (to a considerable degree on the lines of the British Hire-Purchase Acts of 1954, 1965),⁽²²⁾ Cameroon has no such legislation. Hence, the common law position as stated in *Halby v. Matthews*,⁽²³⁾ still governs the relationship between the hirers

21. Suit No. WC/26/65 of 18th March 1966, High Court, Buea, (unreported).

22. See the Nigerian Hire-Purchase Act 1965, discussed in Hicks, A: Nigerian Law of Hire Purchase. Ahma du Bello University Press, Zaria, 1977. See also the Kenyan Hire Purchase Act, discussed in Rogers, M., "A Note on Hire-Purchase and Chattels Mortgage in Kenya" 19.J.A.L. (1975) pp. 154-162.

23. [1895] A.C.471.

and the purchasers. Dealers have not failed to exploit this situation to the hilt and the practice of "snatch back" is still rife. This problem was discussed by the Court of Appeal of Buea (in the English speaking part of the country) in the case of *John Holt Motors v. Ets K.J. Tsewole*.⁽²⁴⁾ The dispute between the parties arose from three hire-purchase agreements for the purchase of three lorries which were exploited by the buyer commercially. On the 19th of July 1968, the appellants notified the respondent that if the latter did not pay the arrears of the hire-purchase instalments which had fallen due, they would seize the lorries in accordance with the hire-purchase terms. When the respondents did not make the said payments, the appellants proceeded to seize the lorries. It was found as a fact that a balance of 2,775,427 CFA francs remained due from the respondents. The important question that the then West Cameroon Court of Appeal was confronted with turned on the question, raised by the respondent's counsel, of the application of equitable principles. Having re-sold the lorries for 4,650,000 CFA francs, the respondent's counsel pleaded that equitable principles should be applied so as to enable the respondent to recover what remained from the re-sale, after setting off the sum that remained outstanding on the hire-purchase contracts.

When this issue was raised at first instance, the presiding judge, Endeley J., said: "Agreements once lawfully and duly executed are made to be enforced and respected. The plaintiffs were plainly in breach of their hire-purchase agreements with the defendants who were therefore well within their rights to redress themselves by resorting to the contractual remedy of seizure and sale."

24. Civ. Appeal No. WCCA/21/70, April 7th 1971, Buea (unreported).

The majority of the Court of Appeal agreed with Endeley J's decision and added that: "Equity, it has been rightly said, mends no man's bargain except in the most exceptional circumstances." In this case, decided in 1971, when as already mentioned a good many African States of the common law tradition had already enacted legislation affording some protection against such seizure, the West Cameroon Court of Appeal still felt itself inclined to follow *Helby v. Matthews*.⁽²⁵⁾ However, one of the three judges, Cotran, C.J., while agreeing with the others that the respondent was in arrears on each of the hire-purchase agreements, however dissented on the question of the application of equitable principles to the facts of this case. In his dissenting judgment, he said: "It is common ground that the appellant, having seized the three vehicles, later sold them for the sum of 4,650,000 CFA francs and after setting this sum off against what was due from the Respondent, the balance of 2,775,426 remained in their favour. In my judgment, the Respondent is entitled in equity and fairness to receive this balance." He went on to say that: "Under Section 14 of our Southern Cameroon High Court Law, 1955, where there is any conflict or variance between the rules of Equity and the rules of Common law, the rules of Equity shall prevail...". He then said: "I accept of course that the courts of England will not readily apply equitable principles to hire-purchase agreements. The reason for this, however, is that the hire-purchase legislation of England is so designed as to protect the hirer. For example, the owner in England cannot seize the property after the hirer pays one-third of the purchase price. Unfortunately, we have no such protective legislation in West Cameroon, and for this reason I

25. See note (23), supra.

take the view that our Courts should more readily apply equitable principles to hire-purchase agreements."

Cotran C.J's dissenting judgment puts the problem of not only hire-purchase contracts but other standardized contracts in perspective. While they such contracts have greatly increased in numbers, the law regulating them has been at a virtual standstill. The judgment of the West Cameroon Court of Appeal reads more like an English nineteenth century judgment, with its emphasis on the sanctity of contract and its total disregard of the fairness of the contract terms, than a 1971 judgment in a country whose consumer population have only recently been exposed to such contracts. The dissenting judgment brings to light the dire need for legislation in this area of the law. In the opinion of Cotran C.J., the absence of protective legislation ought to induce the courts to make more use of the provision in the Southern Cameroon High Court Law (Section 14) authorising the application of equitable principles. Another provision of the same law, Section 27(4) states that: "In cases where no express rule is applicable to a matter in controversy the court shall be governed by the principles of justice, equity and good conscience." Although this provision usually applies to a conflict of laws situation, it could be applied in the case of standardized contracts. It has already been argued in the second chapter that the common law of contract was not designed to deal with standardized contracts. In the last chapter, it was seen that English judges had to devise numerous tools such as the doctrine of fundamental breach, strict interpretation etc., in an attempt to accommodate the common law of contract which in itself is conceptually

inadequate to deal with standardized contracts. Even those devices have not turned out to be effective; hence, numerous pieces of legislation have been and are still being passed to deal with standardized contracts.⁽²⁶⁾ It may therefore be argued that the common law of contract handed down to the then Southern Cameroon was not designed to deal with the bulk of standardized contracts, and that this hiatus in the law should be filled by Section 27(4) of the Southern Cameroon High Court Law, 1955. This point has also been put forward by Zaki Mustapha⁽²⁷⁾ in relation to the treatment of exemption clauses by Sudanese courts. He argues that exemption clauses couched in English, and not specifically brought to the notice of persons illiterate in English in Sudan, ought not to bind the parties. He holds that the courts ought to interpret a similar provision enabling the application of "justice, equity and good conscience" in Sudan, to exclude such exemption clauses from applying. As the case of *John Holt Motors v. Ets. K.J. Teewole*⁽²⁸⁾ shows, Cameroonian courts, like the Sudanese courts, are not inclined to follow such a view.

In one case, however, - *Menyoli Motors Co. Ltd. v. Frederick Ezedigboh*⁽²⁹⁾ the West Cameroon Court of Appeal applied the English case of *Stooklosser v. Johnson*,⁽³⁰⁾ where the English Court of Appeal upheld a general power to grant equitable relief against the forfeiture of the buyer's deposit in a hire-purchase contract after rescission of the contract where the sum forfeited was out of all proportion to the damage suffered by the seller

26. This will be more fully dealt with in the next chapter on "Unconscionability" and also in the chapter dealing with recent legislative innovations.

27. Zaki Mustapha, note (10), *supra*, at pp. 130-131.

28. Note (24), *supra*.

29. Civ. Appeal No. WCCA/7/68, Buea, (unreported).

30. [1954] 1 Q.B. 476.

and when it would be unconscionable for the seller to retain the money. That case, i.e., *Menyoli Motors Co. Ltd. v. Frederiak Ezedigboh*, has, however, never been followed by any court since it was decided. In a recent case, *Mbah Mathias v. Joseph Tata*,⁽³¹⁾ the parties entered into a hire-purchase contract for the sale of a car. The defendant had already paid more than three-quarters of the contract price when he fell into arrears. The plaintiff thereupon seized the car and brought an action claiming the hire-purchase instalments which had already fallen due in accordance with the contract terms. In giving judgment for the plaintiff, the judge said: "In my opinion the plaintiff was perfectly within his rights under the hire-purchase agreements to seize the car as the essence of hire-purchase as stated in *Helby v. Matthews*,⁽³²⁾ and that the ownership of the goods hired remains with the owner until all payments have been made and the hirer has exercised his option to purchase." Up until now, the law of hire-purchase in anglophonic Cameroon is not different from what it was in England in the nineteenth century.⁽³³⁾

Increasingly, judges are recognising the incongruity of continuing with the application of the above common law principles to modern standardized hire-purchase agreements. In *Ngang Chumbon v. Munuwa Zebulon*⁽³⁴⁾ although the hire-purchase contract from which the case arose was not a written standardized contract, its terms as acknowledged by both parties to the action were not different in any way from the major terms inserted in the majority of standardized hire-purchase contracts, particularly

31. Suit No. HCB/7/78 of Feb. 8th 1979, High Court, Bamenda (unreported). This case was decided in the English speaking part of the country.
32. See Note (23), *supra*.
33. It will be seen later that the situation is not different in the francophonic provinces of the country.
34. Suit No. HCB/53/78 of 18th June 1979, Bamenda High Court (unreported).

with regard to seizure for the non-payment of instalments. The subject matter of the hire-purchase contract was a Peugeot 504 car and the hire-purchase price was 2,450,000 CFA francs. The contract was entered into in October 1975. In January 1978 when the car, which the plaintiff used as a taxi cab, was in a garage undergoing repairs, the defendant seized it on the grounds that the plaintiff had fallen in arrears in the payment of the two last instalments which amounted to 250,000 CFA francs, i.e. just about one-tenth of the total hire-purchase price. In deciding whether the defendant was within his legal right in seizing the car, the judge used two lines of reasoning. He said: "Hire-purchase contracts are a typical example of standard form contracts which have been perfected over the years to give maximum possible protection to the seller and a heavy burden on the buyer. So, whereas a judge may fill in large gaps in a sale under a common law contract he will rarely have any gaps in a hire-purchase contract since virtually every contingency will already be specially provided for." He then went on to hold that the present contract was not one of hire-purchase and to buttress this conclusion, he cited the British Hire-Purchase Act of 1938, Section 2 of which stipulates that a hire-purchase contract must be in writing, evidenced by a note or memorandum and signed by the parties. It must be pointed out that this was clearly against Section 14 of the Southern Cameroon's High Court Law 1955 which excludes the application of post-1900 British legislation. Be that as it may, having found that the contract in question was not a hire-purchase contract, he held that it was at best governed by the common law contract of conditional sale in which the defendant agreed to pass the

property of the car to the plaintiff only upon the completion of the last instalment. The question then was whether in view of the fact that the plaintiff had defaulted in the payment of the last two instalments, the defendant could legally seize the vehicle. The judge felt that for seizure to be effective and to override the principles of equity, the right of seizure must be an express and written term of the contract. He however went on to say that even if he were wrong on that score and that the defendant indeed had a right of seizure, that right had not in his estimation been properly exercised. He said: "For a sale of 2,450,000 CFA francs, if there was a balance of 250,000 CFA francs left, I think it was unreasonable for the defendant to seize the car even though the property had not been passed to the plaintiff." He concluded that the only remedy open to the defendant was an action in damages for the non-payment of the last two instalments.

The novelty in Judge Ekor' Tarh's decision in this case is that he held that even if there is in a contract a right of seizure, such a right must be exercised only if it is reasonable. Although he did not treat the present case as one of hire-purchase, that fact was of no moment as far as his judgment is concerned and he could equally have reached the same decision had it been a standardized hire-purchase contract. This is a fundamental departure from the position taken by the West Cameroon Court of Appeal in *John Holt v. Tsawole* (35) and it is a clear recognition of the inadequacy of the common law in this area of the law: contracts must be reasonable if they are to be enforced by the courts. It is hoped

35. See Note (24), supra.

that alas, other judges in the English speaking part of the country where this case was decided will follow suit. The signs are, however, that this might not be the case. It has already been seen that in a similar hire-purchase case decided the same year as the *Ngang Chumbon* case, a different judge in the same court relied squarely on *Helby v. Matthews*, categorically rejecting the concept of reasonableness.⁽³⁶⁾

The fate is not different in the francophonic provinces where French law applies. In French law generally, property passes to the hire-purchaser only upon the payment of the last instalment. The hirer can rescind the contract upon non-payment of any instalment.⁽³⁷⁾ In one decision of the Court of Appeal in Yaounde, *La Société d'Equipement Pour L'Afrique du Cameroun (S.E.A.C.) o/ Danzouri Karamou*,⁽³⁸⁾ a hire - purchase contract was entered into between the parties, in connection with a Mercedes Benz truck in 1971 for a total sum of 3,402,440 CFA francs. In March 1974, SEAC seized the truck when the sum of 316,250 francs which remained outstanding was not paid. In spite of the fact that this amount was less than one-tenth of the total hire-purchase price, the Yaounde Court of Appeal held that CEAC were within their legal rights in accordance with the contract in seizing and re-selling the truck. The problem of "snatch-back" is therefore a feature of hire-purchase contracts in the whole country.

36. See *Mba Mathias v. Joseph Tatah*, Note (31), *supra*.

37. See Mazeaud, *Leçons de Droit Civil*, Tome 3^e, Principaux Contrats par de Juglart, (Éditions Montchrétien, Paris 1974), 921-925.

38. Arrêt No. 102/ADD du 6 Août 1975, Cour d'Appel, Yaoundé (unreported).

C: Contracts for the Sale of Agricultural Produce:

Consideration has been given to contracts relating to the marketing of agricultural produce because they affect a large number of people (cash crop cultivators) and also because of their multiplier effect on the economy.

Basic to all marketing activity is the confidence of the farmers that a sale can take place without fear of extortion or unfairness in their dealings with buyers. The major policy goal here should therefore be to ensure fair bargaining processes and also to raise the bargaining power of cash crop producers. It was to fulfil these requirements that the National Produce Marketing Board was created in Cameroon. Its chief aims are to serve as a buyer and export seller of cocoa and coffee from farmers and also to fix and maintain prices through a fund for stabilizing prices. While the establishment of this Board may lead one to think that little room if any is left for unconscionable contract terms or practices, the reality belies such a view. The Marketing Board, constitutes the largest single buyer of product but is not a monopoly. It operates alongside other buyers who do not come under strict governmental control and who not infrequently take advantage of the illiteracy characteristic of the majority of farmers as the case of *Direct Suppliers Ltd. v. Dairu Kila* (39) shows.

Because the Board is limited in its capacity to go into the four corners of the country, it often acts through licensed buying agents. It is therefore the latter (in addition to co-operatives wherever they exist)

39. Civ. Appeal No. BCA/23/74 of Nov. 28th 1974, Bamenda Court of Appeal (unreported).

who contract with farmers most of the time and who for the most part carry out unfair practices as against farmers.⁽⁴⁰⁾

The licensed buying agents who operate in given geographical areas may, because of the poor transport network in rural areas, wield monopoly power over farmers, thus enabling them to press hard bargains against the latter. Among the unconscionable terms found to be common in such contracts were: a) the imposition of penalties. Before the harvesting season, buyers enter into contracts with producers for the supply of specific quantities of the produce with a stipulation that if the producer does not supply that quantity, he will be subject to the payment of a fine. In *Muyuka Co-operative Ltd. v. Otto Enow*,⁽⁴¹⁾ the Buea High Court (common law jurisdiction) held that such a term was a penalty and was invalid. This decision is surely right because agricultural production being fraught with uncertainties (much depending on the weather), it would certainly be unfair to impose a fine on a producer who does not produce the amount stipulated in the contract. A second widespread malpractice consists in wrongly grading the quality of the produce by buyers. Because many farmers are uncertain about the buyers' good faith, they accept lower prices for ungraded produce.⁽⁴²⁾

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40. Many licensed agents set up sham companies designed to defraud ignorant farmers. In *Ndefru v. George Fonkwo and Others*, Appeal No. BCA/7/76 of March 4th 1977, Bamenda (common law jurisdiction) the appellant company was described by the judge as founded on "actual dishonesty", designed to take advantage of farmers.
 41. Suit No. HCSW/3/76, High Court Buea (1976) (unreported). The above cases were all decided in the English speaking part of the country.
 42. See *Patrick Ateghang v. Ntamandam C.P.M.S. Ltd.* Suit No. HCB/13/76 of February 2nd 1977, Bamenda High Court (unreported).

The extent to which buyers capitalize on their monopoly power is evidenced by the contracts which the Pamol Plantations du Cameroun, S.A., an affiliate of UNILEVER enters into with producers of palm-nuts. The company operates in a geographical area that makes it a monopoly in so far as it is the only company that processes that produce. Two of its contractual terms particularly come in for criticism. First of all, the farmers with whom they deal are bound to sell exclusively to the company but the latter is under no corresponding obligation to buy their produce. The company fixes the contract price unilaterally and reserves the right to reduce the price. Particularly deplored by farmers who enter into contracts with the company is the practice of the company (although no term exists in the contract to this effect) in deducting up to ten per cent of the weight of the produce at certain periods, particularly the rainy season. The company's reason for so doing is to compensate for the excess weight which is made up of water. However valid this reason is, the fact that it is unilaterally decided by the company is indeed resented by the farmers generally who nevertheless have no options but to submit to such terms and practices.

Farmers are unable to influence such buyers for two basic reasons. First of all, even if they could resort to courts (which as will be seen later is by no means easily done), because they deal with monopolies, there is the apprehension that in taking any legal action, they might lose the benefits the contracts afford them in spite of the fact that some of them are glaringly unfair. Secondly, apart from producers of cocoa and coffee, the producers of other cash crops are not at all organized, hence, they do not possess sufficient bargaining power to countervail that of the buyers.

D: Service Contracts:

Service contracts, which range from such everyday contracts as carriage of goods or persons, contracts for the supply of electricity and water, to contracts for the repair of vehicles etc., constitute the bulk of standardized contracts in Cameroon. Indeed, some of them are so trifling and recurrent that it hardly dawns on consumers that they are entering into contracts at all.

Here again, the absence of law reporting makes it impossible to have a clear picture of how the courts deal with such contracts, particularly with exemption clauses which are invariably incorporated in these contracts. Most of the cases that have come before the courts have turned on important contracts (important in terms of the sums of money involved) such as contracts for the repair of vehicles. With regard to contracts such as those for the supply of electricity and water, because the corporations involved are para-statal corporations, most disputes tend to be settled through internal administrative procedures rather than through the regular courts.

An examination of a few of the contract terms put forward by firms involved in the repair of vehicles shows how high-handed these firms are to consumers. In *Albert Ngafor v. S.H.O. Africauto*,⁽⁴³⁾ the plaintiff towed his car, valued at five hundred thousand francs, to the defendant's garage. A "Job Order Card" was opened for the plaintiff. Two months later, no repairs had been carried out on the car. Thereafter, the plaintiff made repeated attempts to get back his car to no avail. Meanwhile, the

43. Suit No. HC/16/72 of 16th July 1973, Bamenda High Court, (unreported).

defendants had sold the car. The plaintiff therefore brought this action for damages for breach of contract. The defendants relied on a clause in their standardized contract which stipulated that fifty per cent of the estimated costs of repairs had to be paid before they could undertake to repair the car. They argued that because the plaintiff had not made the said payment, they considered the car abandoned and were therefore well within their rights in selling it. The Bamenda High Court held that the defendants were precluded from relying on their contract terms because by opening a "Job Order Card", they were estopped from relying on their contractual terms to negative the existence of a contract. The Court held, therefore, that the defendants had acted unreasonably in selling the car.

The case of *A.T. Jinor v. Martha Ngwa*⁽⁴⁴⁾ dealt with the validity of an exclusion clause in a contract for the repair of a car. The respondent delivered her car to the appellant for slight repairs for which she paid six thousand CFA francs. After having completed the repairs, the appellant retained the car on the pretext that some other faults had developed in the car. Four months later, the appellants had still not delivered the car. In this action against him for the loss of the car, he relied on a term in the contract excluding liability for loss. The court, however, rightly held that because failure to deliver the car was deliberate, the appellants could not rely on their exclusion clause and were therefore liable.

The Courts in the anglophonic part of Cameroon have taken the sensible approach of disallowing garage proprietors from relying on any

44. Suit No. BCA/36/74 of 29th November 1974, Bamenda Court of Appeal (unreported).

protective contractual clause whenever there has been a total loss of a vehicle. Although these decisions have not been expressly couched in terms of the doctrine of fundamental breach, that doctrine is implicit in the above decisions.

The Courts in the francophonic provinces have reached similar decisions, albeit via a different line of reasoning. In *Affaire Batoum Joseph C/ Kaptue Hypolite*,⁽⁴⁵⁾ the plaintiff delivered his car to the defendant's garage on the 12th of January 1973 for repairs. After several weeks, the defendant presented the plaintiff with a bill for ninety-one thousand CFA francs, being the cost of the repairs. Meanwhile, the car which had all along been exposed to rain had greatly depreciated in value, with many of its parts completely written-off. The plaintiff sought to recover damages for the depreciation of the car, while the defendant argued that he was covered by a clause limiting liability for such depreciation. The Yaounde High Court, in determining the contractual liability of the defendant, analysed the nature of a contract of repairs. It held that the contract was analogous to a contract of bailment which is governed by Article 1782 of the Civil Code.⁽⁴⁶⁾ The defendant had two definite obligations under the contract: a) to repair the car, b) to re-deliver the car to its owner, at the very least, in the state in which he received it. The Court went on to hold that the defendant had failed in both these obligations and could therefore not rely on any exemption or limitation clause. The contract was "sui generis", with definite obligations which the defendant could not exclude.

45. Judgment Civil No. 114 du 10 Septembre 1974, Trib. de Grande Instance, Yaounde, (unreported).

46. Article 1782 of the Civil Code stipulates that: "Carriers by land and by water are subject for the keeping and conservation of things which are entrusted to them to the same obligations as inn-keepers as is given in the title Bailment and Sequestration."

SHO Africauto o/ *Ntamark Edmond*⁽⁴⁷⁾ is another interesting case. The respondent gave his car to the appellants for repairs. After having taken the car to pieces, the appellants demanded immediate payment of the invoice - eighty three thousand CFA francs. The respondent refused to settle the bill until his car had been repaired. The appellants thereupon levied a daily charge on the car for the period it was in their garage. The Yaounde Court of Appeal, affirming the judgment of the Court of First Instance, held that because the recognised trade practice in this connection was that payment was made only after repairs had been effected, any contractual term stipulating otherwise had to be specifically brought to the notice of the other contracting party. It therefore refused to lend weight to the appellant's contract term providing that the invoice had to be paid before any repairs were made. This decision is an application of the doctrine of notice. The appellant had already dismantled the car when the invoice was presented to the respondent. Because the clause was in derogation of the established trade practice, it was incumbent upon the appellants to specifically intimate to the respondent the terms on which they were to repair the latter's car before dismantling it. In *Cie. C.F.A.O.* o/ *Antoine Lengue*,⁽⁴⁸⁾ the appellants did some minor repairs on the respondents car for which the respondent owed about thirty-three thousand CFA francs. The respondent collected the car from the appellants' garage but the car's engine stalled only four kilometres from the garage, whereupon the respondent took the car back to the appellants' garage. The latter however contended that his obligation on the original contract

47. Arrêt No. 488 du 9 juillet 1970, Cour d'Appel de Yaoundé (unreported).

48. Affaire No. 10/72, 1972, Yaoundé, (unreported).

had been discharged and demanded payment for any subsequent repairs to be carried out on the car.

The Yaounde Court of First Instance however held that irrespective of the terms of the contract between the parties, the mere fact that the car's engine stalled four kilometres away from the garage was indicative of the fact that the appellant had not discharged his obligation under the original contract. The Court of Appeal, however, ordered for an expert inquiry to determine whether the stalling of the engine was in any way connected to the repairs which had already been carried out on the car.

Contracts for the repair of vehicles is one of the few "success areas" therefore, where the courts in the English speaking and French speaking parts of the country alike, have intervened in contracts so as to deprive the garage owners (some of whom are quite large enterprises, for example, SHO Africanto and C.F.A.O.) the use of standardized contracts in driving hard bargains against consumers. The position taken by the courts within the French law tradition appears particularly interesting. By asserting that such contracts are special contracts with definite obligations which should not in any event be excluded, they stifle the effect of exclusion and limitation clauses.

Contracts for the carriage of goods have come under some sort of regulation. Price control legislation (which will be examined in a later chapter) fix the tariffs for the transportation of different categories of goods. They do not, however, touch on other equally important aspects of these contracts, viz., the problem of exclusion and limitation terms. Nearly every ticket issued by the Road Transport Association (SETRACAUCAM),

or by the National Railway, or the National Airline contains an exclusion or limitation clause. Curiously, however, there is a paucity of cases decided by the courts in Cameroon. Judging from the way in which the Cameroonian courts within the common law tradition have dealt with exclusion contracts in sale of goods contracts (to be examined next), it is more likely than not that these exclusion clauses will be validated by the courts.

A recent Supreme Court decision⁽⁴⁹⁾ is of monumental importance, although its application is confined to the courts within the French law tradition. On the 21st of October 1970, goods were delivered to the National Railway Company at Obala, to be transported to Douala. The goods, which consisted of twenty parcels, were stored in the company's warehouse for eventual transportation. Seven months later, the addressee was notified that the parcels had arrived. However, three parcels among the lot were unaccounted for and the sender brought an action for damages. The Railway Company relied in their defence on the fact that the claim was time-barred by statute. The Supreme Court of Cameroon, following a 1973 French decision of the Commercial Chamber of the "Cour de cassation",⁽⁵⁰⁾ held that the statute was only applicable to contracts of transport. In this case, they held that the contract was not one of transport because two important prerequisites of a contract of transport had not been met, i.e. the time the goods are put on the train and the date on which they were to arrive had not been mentioned in the contract. The contract was therefore a mere contract of bailment. In the words of President of the Court: "Attendu qu'un contrat de transport doit contenir la date d'embarquement et la

49. Cour Suprême du Cameroun, 26, Oct. 1978, Pénant, 1980 vol. 91 p.75 (Jurisprudence).

50. Bulletin de Transport, 1973, p.231.

date de livraison (puisque c'est d'ailleurs à compter de cette dernière que courent les délais de l'article 108); qu'en l'absence de cette stipulation il ne pourrait avant l'embarquement effectif et la lettre d'avis d'arrivée y avoir entre les parties qu'un contrat de dépôt." This decision is important inasmuch as if the present contract was not a contract of transport, then any accompanying exclusion or limitation contracts would be inoperative.

However, as Gilbert Mangin⁽⁵¹⁾ write in a note on this case, this decision ought not to be taken as a general rule because in this case seven months had elapsed before the goods were finally transported. Surely, a contract of transport might involve many phases:- the goods may be warehoused for some time before being transported.

Hence it is not clear how far the above decision can give protection to any person sending goods on a contract containing exclusion or limitation clauses.

That the majority of consumers or other persons fail to take notice of limitation and exemption clauses inserted in most service contracts is common knowledge. Indeed, Counsel for the Ministry of Post and Telecommunications, Yaounde, revealed that most people whose goods have been lost in transit by the Post Office expressed dismay when they were confronted with the Post Office's limitation clause which limits the amount recoverable on any loss to just about four thousand CFA francs per parcel (about eight pounds)⁽⁵²⁾

51. Note (49) supra at p. 77.

52. Conversation with Mrs. Dibo Yankey, then Legal Adviser to the Ministry of Post and Telecommunications, Yaounde on the 31st of July 1981.

E: Contracts For the Sale of Goods:

Although the majority of sales of goods take place in markets in which there is considerable haggling over prices and other contractual terms, this area nevertheless constitutes an important one. Most contracts for the sale of expensive goods such as cars, electrical instruments (refrigerators, cookers, radios etc.) are standardized, carried out by large firms. Here again, the nature of the contracts is largely determined by economic imperatives. The dominance of a few firms in the market for some of these goods and the fact that the supply of these luxury goods can hardly ever meet their escalating demand means that sellers have a much superior bargaining power which, as the cases show, they do not hesitate to exploit to the hilt. This has been most acute in the sale of second-hand cars. Practically all businesses involved in that trade have standardized contract terms negating any warranty, express or implied.

In *Scholastioa Nsaiboti v. Felix Ezeafor*,⁽⁵³⁾ the appellant bought a second-hand car from the respondent car dealer who made oral representations to the effect that the car was one year old and in good working condition. The oral representation proved to be untrue since the car was indeed older than that and was utterly defective. The contract, however, contained a term that excluded liability for any defect in the car and for any implied or express warranty. The Bamenda Court of Appeal (in the English speaking part of the country), in upholding the High Court decision in favour of the respondent had this to say: "Restricted though

53. Appeal No. BCA/6/73 of March 1974, Bamenda Court of Appeal (unreported).

the doctrine of 'caveat emptor' might be in its application to contracts of sale, its application in the buying of a second-hand car is in my opinion most fitting since there is very little by way of guarantee that the seller could give as to its fitness" - per Rupert Thomas J., President of the Court.

If the above case shows the courts in the Anglophonic provinces of Cameroon to be insensitive to the problem of exclusion clauses in connection with the sale of second-hand cars, the case of *Michael Etwe v. Hubert Euverte*⁽⁵⁴⁾ accentuates this point. On the 13th of May 1974, at about 10 a.m., the plaintiff entered into a written contract with the defendant for the sale of a second-hand car. The contractual document stipulated that the buyer had been given the opportunity of examining the car and that any liability whatsoever was excluded. The plaintiff signed the contractual document allegedly without reading it. On the same day the sale took place, at about 5 p.m., the car's engine stalled and the car was, on later examination, proved to be considerably defective. The plaintiff tried to get a refund of the contract price from the defendant on the grounds that the car was worthless, whereupon he brought this action. The Buea High Court held that the terms of the contract were clear and wholly unambiguous and that in the absence of fraud, they were binding on the parties.-

This case is similar in certain respects to *Karsales (Harrow) Ltd. v. Wallis*⁽⁵⁵⁾ where the plaintiff bought a second-hand car which "would not go". In that case, however, the English Court of Appeal refused to uphold

54. Suit No. HCSW/24, 1974, Buea High Court (unreported).

55. [1956] 2 All. E.R. 868.

a similar clause excluding liability because the defendant had been guilty of a fundamental breach of contract. In the above Cameroonian case, the fact that the car was second-hand appears to have been the paramount factor in deciding the case. The courts there take the view that a dealer is entitled to pass on to purchasers anything that looks like a car: whether it is functioning or not appears to be irrelevant. It is submitted that inasmuch as used cars are more likely to be defective in some way, the fact that a car which is represented by the dealer to be in good working condition should be discovered to be wholly defective, incapable of self-propulsion, a matter of hours after it has been bought, must be sufficient evidence that there has been a fundamental breach of contract as in *Karsales v. Wallis* (above).

The problem of unfairness in standardized contracts for the sale of goods is not limited to exclusion clauses. In *Mangwa v. SCOA Motors*,⁽⁵⁶⁾ the plaintiff entered into a written agreement with the defendants which he understood to be a contract for the sale of a "Peugot 404" car on the 19th of August 1969. He paid six hundred thousand CFA francs as a deposit for the car. The defendant motor-dealers ordered the car but eventually sold it to another of their clients when it arrived, whereupon the plaintiff brought this action for breach of contract. The defendants relied on a clause written in very small print in their contract form which provided that the agreement entered into was merely to order a car and not an agreement for the sale of a car. It further stipulated that any deposit was paid on those terms. The Buea High Court in holding for the

56. Suit No. WC/93/69, 1970, Buea High Court (unreported).

defendant, said that the plaintiff was mistaken as to the nature of the transaction which was not a sale and that provided the defendants refunded the plaintiff's deposit, they were not in breach of the agreement. It is evident, however, that the plaintiff paid the deposit on the understanding that he was entering into a contract of sale. The defendants must have also known this but because of the afore-mentioned clause they inserted into their standardized contract, they knew they could proceed to sell the car to a different buyer without any qualms, which they successfully did. Although the point that adequate notice as to the existence of that particular clause was not given to the plaintiff was not argued by him, the Court ought to have taken this into consideration, particularly in view of the fact that it is an unusual clause. Few buyers if any would pay a deposit for a car if it was not going to be sold to them at the end of the day. It is unlikely that most Cameroonians would read the fine-print of a sales agreement, let alone to appreciate the distinction between an agreement to order a car and an agreement to sell a car.

The only case which was discovered in which a Court in the English speaking part of Cameroon introduced the notion of reasonableness of contract clauses is that of *Kendu v. Cameroon International Co. Ltd.* (57) The plaintiff in this case paid for a deep-freezer but up to six months later he had not obtained delivery of the deep-freezer. In an action for breach of contract, the defendants contended that it was the practice, which was made known to the plaintiff, that their customers had to wait for some time before obtaining delivery and that this was indeed a term

57. Suit No. HCSW/12/78, 1979, High Court, Kumba (unreported).

of their contract with the plaintiff. The Court held that such a term must be subject to a condition of reasonableness and that in this case, six months was an unreasonably long time to wait for delivery.

A widespread complaint made by Cameroonian consumers against sellers is that although most of them sell valuable items such as cars with guarantees, the guarantee clauses are often not respected or are construed very restrictively by the sellers. Two decisions of the Yaounde courts in the French speaking part of the country demonstrate this point. In *Levendis Athanase o/ SHO Africauto*,⁽⁵⁸⁾ the appellant bought two cars from the respondents. Clause 7 of the respondents' standard sales agreement provided that the cars were sold under a guarantee for twelve months or fifteen thousand kilometres, whichever was longer. Before this guarantee had run out, various parts of the car were replaced in the respondents' garage and the respondent brought a claim before the Yaounde First Instance Court for the cost of the replaced parts. The Court of First Instance held that the guarantee clause did not cover such replacements but that decision was reversed by the Yaounde Court of Appeal which held that such a limitation of the guarantee clause was improper.

A good many of the guarantee clauses examined provided that the guarantee covers only major defects. That was the case in *Kandem Simon o/ SHO Africauto*,⁽⁵⁹⁾ where the guarantee clause, similar to the one above provided that only major defects in the car were covered. Before the guarantee expired, the car developed minor faults which were repaired by the defendant and paid for by the plaintiff. Thereafter, a series of

58. Affaire No. 25/72, 1973, Cour d'Appel, Yaounde, (unreported).

59. Judgment No. 55 du Janvier, 22, 1974, Grande Instance, Yaounde (unreported).

faults developed in the car which, taken separately, were minor but which, taken together, were major. The plaintiff then instructed the defendants to sell the car and the latter did so for the sum of six hundred thousand CFA francs. However, they only tendered to the plaintiff eighty six thousand CFA francs, claiming that the balance, five hundred and fourteen thousand francs, covered the cost of repairs. The Yaounde High Court held that the defects in the car were covered by the guarantee clause and further held that in any event such a limitation of the guarantee was unfair. In the words of the Court, the defendant had acted in an "abusive, arbitrary and unjustified" manner. This is illustrative of the high-handedness with which dealers treat consumers.

A classic example of this high-handedness is the case of *Brasseries du Cameroun v. Mokake Elali*.⁽⁶⁰⁾ In 1970, an agreement was entered into between the appellant brewers and the respondent, whereby the former were to supply the latter with their drinks, which the latter sold on a commission basis. Sometime thereafter, some of the respondent's customers complained that they had bought unwholesome beer from the latter's off-licence shop. The respondent wrote to the appellants about it and the latter sent him five bottles of beer as compensation which he refused to accept. In 1973, the respondent again received many complaints about the unwholesomeness of the drinks he sold, complaints which were corroborated by the local health superintendent. As a result, the plaintiff began losing a lot of his custom. He therefore wrote to the Director of the local branch of the appellant company expressing his concern. Consequently,

60. Civ. Appeal No. CASWP/14/79, 1980, Buea Court of Appeal (unreported).

the appellants stopped supplying him with their products whereupon he brought an action for breach of contract. It must be pointed out that the appellants, who account for about seventy per cent of the country's total drink production, enter into similar agreements with small retailers all over the country. A card is issued by the company to the retailer containing the retailer's address and a code number. The High Court judge held that the issuing of that card, along with the subsequent practice of delivering their drinks at the respondent's shop, constituted a definite agreement which the appellant had breached.⁽⁶¹⁾ The company appealed, contending that the issuing of the card and the subsequent course of conduct were insufficient to imply a continuing contract between the parties, and that each delivery by them constituted a separate contract of sale. The Buea Court of Appeal (common law jurisdiction) agreed with the appellants. Thus, in spite of the fact that the company's action in ceasing supplies was an act of victimization for the plaintiff's justified complaints, and regardless of the course of conduct of the parties which was consistent for four years, the Court of Appeal held that there was no definite contract between the parties.

Hence, by deliberately eschewing definite terms from their contracts, the company can therefore breach an agreement entered into with retailers at their pleasure with absolute impunity. The Court of Appeal decided this case purely in terms of offer and acceptance, paying no attention to the reasonableness of the agreement, neither to the fact that numerous other retailers will be equally affected.

61. The High Court judge relied partly on the principle of equitable estoppel, and cited Central London Property Trust Ltd. v. High Trees House Ltd. [1947] 1 K.B.

F: Evaluation of the Cameroonian Position:

An evaluation of the effectiveness of the Cameroonian courts in dealing with standardized contracts will be dealt with in the last chapter of this thesis. However, some conclusions can be drawn right away from the above discussion. The first is that although the law of contract in Cameroon is patterned on the law contract in England and France, both the anglophonic, i.e. the common law jurisdiction, and the francophonic, the civil law jurisdiction, have not really applied the techniques used by English and French law in coping with the problems of standardized contracts. Not in a single case have the Cameroonian courts attempted to deal with the preliminary problem of incorporation of terms into the contract as have both the English and French courts.

In the control of exemption and limitation clauses, the English doctrine of fundamental breach was not mentioned in any of the cases in the Cameroonian courts of Common Law tradition. Neither is the concept of a "serious fault" (i.e. *faute lourde* or *faute dolosive*) relied upon by French courts used in the francophonic courts. The latter, however, in the manner of the French courts, are quite astute in holding a businessman liable where in a sale of goods contract, the good had a hidden defect.

Secondly, the concept of freedom of contract, and its corollary, the sanctity of contract still have a cardinal role to play in Cameroon, although their importance for the law of contract in both England and France has withered immensely. One would have expected that in view of the severe socio-economic and cultural problems already alluded to that are prevalent in Cameroon, i.e. illiteracy which affects about eighty per

cent of the population, vast disparities in economic power etc., the courts would impose stricter controls over standardized contracts. In *Ukpai Meeha v. AGIP (Cameroon)*,⁽⁶²⁾ the court recognised the fact that the plaintiff's illiteracy was the cause of his misapprehension of the terms of the contract, the court was merely apologetic about it and no relief given whatsoever.

Rather unfortunately, the available cases do not permit a more thorough and elaborate study of the way exclusion clauses in particular are dealt with by the courts. However, the cases examined above prove that both the courts of the common law and the civil law traditions in Cameroon do not look at the reasonableness of such clauses. To be sure, rarely have the plaintiffs raised this point. However, that does not explain why the courts, whose duty is after all to dispense justice, do not take the reasonableness of the clauses in dispute in enforcing them.

In this regard, Cameroon is not alone. A cursory look at the decisions of the Courts of a few other African countries reveal the same judicial attitude. In a study of the judicial treatment of exclusion clauses in Sudan, Zaki Mustapha concludes that: "one can say that the general attitude of our courts (i.e. Sudanese courts) to exemption clauses, as usual, has been a fairly unsettled one, lacking in consistency and proceeding on no clear principle." He further states that: "Our courts have shown no serious inclination to go into the merits of exemption clauses or to question their reasonableness or conscionability."⁽⁶³⁾ The Nigerian courts also simply follow the English judicial attitude towards such contracts, taking little account (except in the case of illiterate parties as explained above) of local factors.⁽⁶⁴⁾

62. Note (4) *supra*.

63. Zaki Mustapha, note (10), *supra* at pp. 166-167.

64. See Achike, *Nigerian Law of Contract* (Enugu, 1972), pp. 106-113.

In other Civil Law jurisdictions in Africa, the tale is the same. In one Tchadian Court of Appeal case,⁽⁶⁵⁾ the plaintiff dispatched goods through the "Unitchadienne" - the National Railway Company. He was issued with a ticket which contained a limitation clause. The plaintiff contended that he did not read the clause which was written on the back of the ticket. The court held that it was firmly established by case law that such a clause was entirely legal, provided it stipulated that the minimum legal indemnity was payable. That the plaintiff did not read it was immaterial. A similar case in the Republic of Congo⁽⁶⁶⁾ was similarly decided. The reasons for the failure of the Cameroonian courts (and these may be equally valid for the other jurisdictions mentioned above), will be looked at in the last chapter. However, it would appear that they have not found a strong conceptual basis to justify interference with contracts. An elaboration of such a conceptual basis is the task of the next chapter on unconscionability. The principle of unconscionability has in recent years been resorted to particularly by Anglo-American Courts whose chequered treatment of standardized contracts by the use of 'covert tools' such as strict interpretation and the doctrine of fundamental breach made it difficult to say the least for businessmen, consumers and even lawyers alike to ascertain when a standardized contract will be upheld by the courts or not.⁽⁶⁷⁾

65. Cour d'Appel de Fort Lamy, 24 Octobre 1969, *Pénant*, 1972, vol. 82, p. 393.

66. Cour d'Appel de Brazzaville, 12 janvier 1968, *Pénant*, 1970, vol. 80, p. 472.

67. See Chapter Three generally.

CHAPTER FIVE:

"UNCONSCIONABILITY" IN STANDARDIZED CONTRACTS

Section 1: History of "Unconscionability"

Although it is only recently that it has emerged in the limelight in legal literature, the concept of unconscionability has existed since the early years of the common law. The concept was never unequivocally spelt out but various aspects of it were manifested not only in the early writings but also in some of the decisions. There were three strands to the doctrine: the Roman law concept of "laesio enormis"; the medieval theory of the "just price" which was the common law adaptation of the "laesio enormis"; the refusal to enforce contracts on the grounds of inadequacy of consideration in the early part of the eighteenth century.

The beginnings of the concept of unconscionability go back as far as Roman Law which provided for the doctrine of "laesio enormis", a doctrine inspired by the moral ideas which proposed a fair exchange as the ideal of a contract. The doctrine was however of very limited application since it provided that in the sale of land, the vendor could demand rescission if the price received was less than half of the value of the land. The doctrine was therefore very narrow in scope but the underlying moral idea that a contract could be rescinded because it was unconscionable was of cardinal importance. The doctrine could be broadened to incorporate the sale of immovables and that is precisely what legal scholars and theologians did during the medieval period in developing a concept of "just price".

1. T. Aquinas: Commentaria in X. Libros Ethicorum and Nicomachum.
Lib. v. Lect. 7.8.9 Parma Ed of Omnia XXI, 108, 171, 172.

The concept of "just price" owes its formulation to the Scholastics, most notably to Thomas Aquinas⁽¹⁾ and Albert Magnus who based their comments on Aristotle's "Nicomachean Ethics", where he makes the point that contractual justice requires that there must be an equivalence between what is given and what is received and that any exchange which violates this rule is an unfair one. Aristotle's position could be interpreted from a Marxist point of view to mean that the just price of a product should correspond to the cost of production which in mediaeval England would have considered mainly of labour costs. That was not however Aquinas's position for he stated that the just price is "the one, which at a given time, can be gotten from the buyers assuming common knowledge and in the absence of all fraud and coercion".⁽²⁾ This has been taken to mean that Aquinas upheld the market price. It must be remembered however that the notion of a market then was not the abstract notion of a market known today, but was limited to the physical place where exchange lawfully took place. Underlying his position is the supposition that there is perfect competition in the market, although the expression was not used until the 16th century by Louis de Moliner. There is also a stress on the absence of any fraud or undue influence. He further stated that the "just price of things is not fixed with mathematical precision, but depends on a kind of estimate, so that a slight addition or subtraction would not seem to destroy the Equity of Justice."⁽³⁾

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2. Comments on Summa Theologica, II.ii qu 77 art 1 (Leonine edition, vi, 1949) cf Lewis Watt, "The Theory Lying Behind the Historical Concept of the Just Price", in V.A. Dumant, ed, The Just Price, (London, 1930) p. 69.
 3. Summa Theologica, Part 2 Q 77 art 1 at 320 [Fathers of the English Dominican Province Translation, 1929].

Later scholastic doctors followed in this vein and by the 16th century price was adjudged to be fixed by "common estimation" which of course, assumed the existence of a perfectly competitive market. Whenever the market failed to function properly, for instance in the case of a monopoly, in the view of the scholastics, the legislator had to step in and regulate the price. The price would thus be the "legal price". The scholastics were therefore at one in the condemnation of any practices which were deleterious to the maintenance of competition. The only way of ensuring that the "just price" was arrived at was the adoption of a policy which encouraged competition. Thus, peasants were encouraged to take their products straight to the market and sell them there, thus eliminating middlemen.

Some commentators, like Horwitz, have argued that there was, from the medieval period up until the 18th century the idea that things had their proper value, independently of the operation of market forces.⁽⁴⁾ He thus puts forward the view that there existed in pre-19th century contract law, a substantive notion of consideration. Others such as Simpson argue that no such notion existed; and that on the contrary, the value of the product depended on the market.⁽⁵⁾ Given the restricted meaning of market in pre-19th century economy and the fact that the legislator could intervene and impose a legal price whenever the market did not function properly, the question then is whether these seemingly antithetical points of view cannot after all be reconciled. It has already been pointed out that intervention came about either as a

4. Horwitz; "The Historical Foundations of Modern Contract Law", 87 Harv. L. Rev (1974), p. 917.

5. A.W. Simpson; "Horwitz and the History of Contracts", 46 Univ. of Chicago L. Rev., (1979), 533.

result of unfair competition or as a result of an imbalance created by either an unusually heavy demand or poor conditions of supply.⁽⁶⁾ In the absence of these factors, the "communisaestimatio" which determines the price will surely approximate more or less to the value of the product itself in the eyes of the consumers. Any price in excess of that would surely be unconscionable.

Although the philosophical writings during this period did not on their own determine the course of contract law, it is fair to say as Professor Simpson points out, that academics and philosophers have influenced the growth and development of the common law much more than is made out in the standard text books on contract.⁽⁷⁾ Thus, the "just price" of the medieval period found its way into the substantive doctrine of consideration and ultimately into the equitable doctrine of unconscionability.

Horwitz asserts that eighteenth century courts accepted the "substantive doctrine of consideration". Simpson contends that this point of view cannot be vindicated for the evidence in support of the "Horwitz thesis" is not unequivocal. Nevertheless, an examination of some of the eighteenth century cases bring out two points:

- (1) The courts refused to grant a decree of specific performance where the facts of the case pointed to an imbalance in the exchange and what the plaintiff got at best was substitutionary relief.
- (2) Where the imbalance resulted from inequality of bargaining power of the parties only, no relief was granted at all. Some 18th century cases illustrate these points.

6. W. Ashley, Economic History and Theory, (1931) pp. 132-148.

7. Simpson, note 5 supra.

In *Barnadiston v. Lingwood*,⁽⁸⁾ there was an agreed sale for the remainder of an estate for £300. It was established that the value of the estate was much more than the price paid and the vendor brought an action to set aside the sale while the purchaser brought a cross action for specific performance. Lord Hardwicke, Lord Chancellor, held that the question whether fraud existed or not was immaterial for "if it is only a hard bargain or unreasonable bargain, that is a reason sufficient why this Court will not give its Assistance". He held that the consideration for the estate was so small that it rendered the sale invalid.

Similarly, in *Townsend v. Warren*,⁽⁹⁾ and 1843 case, an action was brought to set aside the purchase of an estate which was sold for an inadequate price. Although the court refused to set aside the contract, it referred it to a master to enquire if the sale was at an undervalue and if so, to require the purchaser's representatives to pay the difference. In *Savile v. Savil*,⁽¹⁰⁾ the contract was not set aside entirely. A bidder had offered to pay £10,500 for "Halifax House" in St. James's Square and had paid a deposit of £1000. Lord Macclesfield L.C. held that a party would not be bound to pay an unreasonable price for an estate. The court however gave restitutionary relief tantamount to an award of liquidated damages to the vendor by upholding a forfeiture of the deposit. The remedy sought by the vendor - specific performance - was not awarded. In *Underwood v. Hitchox*,⁽¹¹⁾ a case in which specific performance was sought for a contract for the sale of an estate, the Lord

8. 2 Atk, 133 27 Eng Rep. p. 669 (1740)

9. 6 Ir Eq R. 629, 14 Digest of Eng Case Law 1407 (1843)

10. 1 P.Wmb 745 24 Eng Rep 596 (1721)

11. 1 Ves Sen 249; 27 Eng Rep 1031 (1749)

Chancellor said: "undoubtedly every agreement of which there should be specific performance, ought to be in writing, certain, and fair in all its parts, and for adequate consideration. He further said that mere valuable consideration was not enough. The same decision was reached in *Buxton v. Lister*,⁽¹²⁾ which dealt with the sale of chattels.

In some other cases however different decisions were arrived at by the 18th century courts. Hence, the evidence for the Horwitz thesis does not go uncontroverted. In *Heathcote v. Paignon*,⁽¹³⁾ the Lord Chancellor said "[i]f there is such inadequacy as to show that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will shew a command over him which may amount to fraud. If the transaction be such as marks an over-reaching on one side, an imbecility on the other, it puts the parties in such a situation, as to show it could not have taken place without superior power on the one side over the other". Although the sale of the annuity in this case was set aside for inadequacy of price, the reasons given were different from the reasons in *Underwood v. Hitchox* which was based entirely on inadequacy of price. The decision in *Gwynne v. Heaton*⁽¹⁴⁾ was similarly decided. In an action for relief against a conveyance, Lord Thurlow said "To set aside a conveyance, there must be an inequality so strong, gross

12. 3 Alk 338; 26 Eng Rep. 1020. Ch. (1746)

13. 2 Brocc 167, 29 Engl Rep. 96 Ch. (1778) at p. 100.

14. 1 Bro cc 1, 28 Eng. Rep. 949. (1780)

and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it".

Towards the end of the 18th Century therefore a contract could be set aside only when there was an imbalance which suggested fraud or undue influence, and not merely on the ground that there was an inadequacy of consideration.⁽¹⁵⁾

The question of price is simply one aspect of unconscionability in contracts. Other cases point to the fact that the courts have in one way or the other interfered with contracts in the teeth of the parties' intentions. This is particularly so in forfeiture and penalty cases where equitable relief has always been given by the courts, notwithstanding the clarity of the terms of the contract, so long as the court considered the terms unconscionable.

In *Re Dixon, Haynes v. Dixon*,⁽¹⁶⁾ Rigby L.J. said: "The Court of Chancery gave relief against the strictness of the common law in cases of penalty or forfeiture for non-payment of a fixed sum on a day certain, on the principle that failure to pay the principal on a certain day could be compensated sufficiently by payment of principal and interest with costs at a subsequent day."

This is not the place to investigate the whole maze of equitable remedies which protected parties from the unreasonableness of contractual terms. The main concern here is to show that unreasonableness and

15. With the development of the doctrine of consideration in the 19th century, the principle that a court will not in general enquire into adequacy of consideration was formulated.

16. [1900] 2 Ch. 561 at 576.

unconscionability were the original basis for the courts' interference with contracts. This is evident from the cases discussed above. The courts increasingly became formalized in the nineteenth century and this process made them less astute to refer to vague notions such as unconscionability or fairness. The end product of this was the development of other techniques which, ironically, sometimes led to the striking down of contracts which were quite fair and reasonable. An example of this was the development of the rule against collateral advantages which came under attack from Lord Halsburg in *Samuel v. Jarrah Timber Co.* (17) He said "A perfectly fair bargain made between two parties to it, each of whom was quite sensible as to what they are doing, is not to be performed because at the same time a mortgage arrangement was made between them". Decades later, a similar result was arrived at through the doctrine of fundamental breach in the celebrated case of *Harbutt's Plasticine Ltd. v. Wayne Tank & Pump Co. Ltd.*, as already observed in Chapter Three.

SECTION TWO "Unconscionability" : The Principle

From the current literature and the innumerable statutory enactments, particularly in the United States of America; and through the influence of a great many judges, notably Lord Denning and Lord Devlin, it can safely be said that contract law has undergone a volte-face from its earlier stance and the principle of unconscionability has become very much in the forefront of contractual analysis.

17. [1904] A.C. 323.

While this fact has become incontrovertible, a great deal of controversy looms as regards what the principle should consist of.

Principles and Rules

Although courts have always acknowledged the use of general standards (for that is after all what the law is made up of), it was Professor Dworkin who brought into the forefront of legal analysis the vital role of principles in Anglo-American Law.⁽¹⁸⁾ Dworkin distinguishes first of all between standards such as 'principles' and 'policies' on the one hand, and 'rules' on the other. Principles (used here generically to cover standards other than rules) form a residuary category of standards and they do not completely dispose of cases the way rules do. He says a rule, such as one imposing a maximum speed limit is applicable in an all-or-nothing manner.⁽¹⁹⁾ A rule therefore either applies to a situation or contributes nothing to the decision. To be sure, even for a rule to apply in this manner, all its exceptions have to be incorporated in its formulation. To illustrate this point, Dworkin discusses two cases: In the 1889 New York case of *Riggs v. Palmer*,⁽²⁰⁾ a beneficiary to a will murdered the testator, his grandfather. In the absence of any rule governing the situation, the court relied on the principle that "no man shall

18. Dworkin: Taking Rights Seriously, (Duckworth, 1977) pp.22-39
Roscoe Pound distinguished between "standards" on the one hand and "principles", "rule" or "conception" on the other. Hence he terms "standard" what Dworkin terms "principle". See Pound, "Theory of Judicial Decision", 36 Harv L. Rev. 641, 645-46 (1923)

19. Dworkin, p. 24.

20. 115, N.Y. 506, 22 N.E 188 [1889].

be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime". The court consequently held that the murderer could not receive the inheritance.

In the more modern case of *Henningesen v. Bloomfield Motors Inc.*⁽²¹⁾ the question turned on the extent to which an automobile manufacturer could limit his liability in case the automobile was defective. An accident was caused and personal injuries sustained due to defects in the automobile. The court, in holding that the manufacturer could not rely on the limitation of his liability, grounded its decision on three principles: (1) that the courts will not themselves be used as instruments of inequity and injustice; (2) that "the courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other..." (3) that "the manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars". Thus, the directions given by principles differ in character from the directions given by rules. Dworkin further points out that principles have a dimension of weight and importance which rules do not have. As in the *Henningesen* case, many principles may intersect and such cases may only be resolved by taking into consideration the relative importance of principles. In *Henningesen*, the protection of consumers was the overriding principle. Dworkin concludes therefore that in "hard cases", where no settled rule is recognised, a proper decision can only be arrived at through an argument of principle.

21. 32 N.J. 358, 161 A 2d 69 [1960].

Although the term "principle" has been so far used here to denote standards other than rules, Dworkin makes the distinction between a principle and a policy. A principle is a standard which is adhered to irrespective of the advancement of any particular goal. It is applied because it is a requirement of justice, fairness, or any other dimension of morality. A policy however is a standard which sets out a goal to be attained, notably some economic, political or social improvement of the community.

It is in this respect that unconscionability can be described as a principle in the broader sense. On the one hand, it prescribed that there should be a certain standard of fairness not merely in commercial transactions, but also in consumer transactions.⁽²²⁾ On the other hand, it takes the form of a policy, viz. to ensure that consumers will not be unduly exploited by the offers of goods and services. Unfortunately, such goals have usually been put forward in a very self-evident manner and not much effort has been put in by researchers who posit them to give them the necessary precision and explicitness. In the first place what is posited abstractly as a goal may simply be a substitution of the values held by a class of people. The 19th century and early 20th century formulation of the principle of freedom of contract and "caveat emptor" were undoubtedly a reflection of the values of a small class - the business community - but it had its greatest impact on the consumers. It is in this regard that public opinion is indeed relevant. In determining legal standards, if resort is had to abstract ethical

22. What this standard of fairness should be and how it is arrived at will be the subject of this chapter.

standards, it then becomes easy to substitute the values of a particular group for those of the society at large. If on the other hand resort is had to public opinion, it then becomes possible to bring into judicial consideration the broader social and economic interests of the public at large. This has been the case in the sphere of illegal and immoral contracts. Such contracts had been made unenforceable by the courts not merely in the interests of the parties to the contract but for the benefit of the public. To be sure, the question may be asked as to how public opinion is monitored and stated. This question will be delved into later but suffice it to say that for the purposes of unconscionability many factors will have to be taken into consideration.

In recent years, there have been a good many articles and comments on the principle of unconscionability. The breadth of meaning academics and even judges give to the concept justifies the point which was made earlier, that the principle has not been posited with as much explicitness and precision as would be required for its practical working. This fact lends weight to the contention that unconscionability is an amorphous and meaningless concept. Furthermore, by not defining the precise parameters of the principle, some commentators fear that too wide a latitude will be given to those charged with its enforcement, thus making the principle liable to abuse. Some however object to having a concrete definition of the principle for various reasons.⁽²³⁾ The first reason is that it is

23. J.C. Fort: "Understanding Unconscionability: Defining the Principle", 9 Loyola Univ. L.J. (1978) at p. 765.

doubtful whether there can emerge from the various commentaries and cases which have a bearing on the principle any definition which can cover all possible cases that may fall under the ambit of the principle. Even if it were possible, the desirability is questioned first of all because by formulating strict definitions, the principle of unconscionability may take the form of a rule which as was discussed earlier, is applicable in an all-or-nothing manner. From the first chapter it was seen that the tale of the law of contract has been one of inflexibility of doctrines, an inflexibility resulting largely from the reduction of principles into strictly adhered to rules. The principle of unconscionability has had its antecedents in the common law doctrines of fraud, misrepresentation and undue influence. However once they were reduced into specific rules, these concepts became water-tight and could not cover the sort of unfairness that resulted from the use of standardized contracts. The argument against having a strict definition of unconscionability is grounded on the assumption that any strict definition would sooner or later become outmoded and thus incapable of keeping pace with commercial developments.

A more fundamental question concerns the desirability of the principle of unconscionability itself. The quintessence of the principle is that the parties to a contract must deal with each other in good faith as to the formation of the contract and that the terms of the contract must be reasonably fair. Certain criticisms may be levelled against this proposition. It might first of all be contended that the notions of good faith and fairness are too vague to be taken seriously for any meaningful application; secondly it might be said that this is taking a moralistic position in the law

of contract. Thirdly, it has been suggested that these notions can only be applied subjectively by whosoever is charged with its application (judges and administrators); finally, it may be said that covert instruments such as statutory interpretation, misrepresentation and the doctrine of fundamental breach have been successfully used and that the use of the principle of unconscionability may simply bring about uncertainty.

Certainly, when legal concepts are formulated in categories other than rules, their application becomes more problematic and uncertain. This appears however to be a small price to pay for the higher objective of arriving at just results. It is trite to say that equitable notions of good faith and fairness permeate the whole of the law of contract, and indeed of the law in general, as evidenced by tort law and criminal law. The principle of unconscionability however is not merely an abstract notion but it has specific referents which will be examined in due course.

In most cases, parties acting in an unconscionable manner in contracts frustrate the justifiable expectations of the other parties. They may do so by using their superior position (as drafters of standard contracts) to exploit the weaker position of others (particularly the poor, ill-informed and necessitous consumers). Hence, the doctrine of unconscionability, although derived from the general requirement of good faith and fairness in contractual relationships (and in most other legal relationships), nevertheless has its own specific content and as such it is a substantive and not an abstract principle.

The principle of unconscionability certainly has overtones of morality, but surely that criticism does nothing to invalidate its validity since overtones of morality are prevalent in all other branches of the law. The whole of tort law is after all a general standard of what is socially thought to be wrongful civil conduct; so is the criminal law. The standards they set encapsulate the moral ideas of any given society. In the second chapter, the myth that contract law is distinct because it derives its source from a consensual arrangement has already been exploded, and need not be discussed further.

The argument that the principle cannot be objectively applied is surely the most difficult to discard. This argument is based on the assumption that those charged with its application can only do so by relying on emotional and intellectual considerations instead of objective factual ones. Unfortunately, a good deal of the cases based on the principle both in England and the United States where the principle has been most alive for some time, have been dealt with on a more or less ad hoc basis and therefore tends to lend weight to the above contention. The thesis put forward here however, is that although it is not desirable or even possible to formulate the principle into rules, a conceptual framework can nevertheless be established within which there can be an objective application of the principle.

The basic question to ask in formulating a framework for the principle is what concepts are involved in it? What types of contractual terms are harsh enough to be rendered unenforceable and what would be the yardstick in determining such harshness?

From most of the discussions on unconscionability the commentators appear to be agreed on one point: that there are two aspects to unconscionability - procedural and substantive unconscionability, a distinction first put forward by Professor Leff.⁽²⁴⁾ Procedural unconscionability refers to the abuses inherent in the formation of the contract and it has two components: "unfair surprise" which implies some sort of deceptive conduct during the formation of the contract, and "oppression" which basically results from the adhesive nature of standard contracts whereby one party determines the terms of the contract while the other party simply takes the contract or leaves it. Substantive unconscionability refers to actual unfairness in the terms of the contract. On the final objection that the use of other surreptitious methods have ensured that contracts have been fair, one can only quote Llewellyn's famous tag that "covert tools are never reliable tools". The attack on unfair contracts by such devices as construction, fundamental breach etc, make it possible for the draftsman to redraft the clause in such a manner that no leeway is left for the judge to construe the contract against him. More importantly, the use of such devices is predicated upon judicial intervention. In Cameroon, because of the high costs of litigation and the nearly complete absence of legal education on the part of the consumer population, only an infinitesimal number of cases on unconscionable contracts ever reach the courts.

24. Leff, A, "Unconscionability and the Code - The Emperor's New Clause". 115, University of Pennsylvania L. Rev. (1967), 485.

With the adoption of the principle of unconscionability however other forms of control, such as administrative controls may be envisaged. Moreover, it will give rise to a greater predictability of judicial decisions.

Section 3: "Unconscionability": Analysis

As earlier pointed out, there are two aspects to the principle of unconscionability. While the presence of any procedural defect is not alone sufficient to render a contract unenforceable, it is nevertheless of cardinal importance because as will be ascertained from the cases, in many instances, substantive unfairness is a direct consequence of procedural defects. The documents on which standard contracts are printed exhibit certain characteristics. In the first place they are not at all easy to read. The most important clauses, usually those which limit or exclude liability are often couched in very ambiguous terms in very fine print on the back of the form. The contracts hardly ever spell out the fact that the mere fact of appending one's signature "on the dotted line" constitutes an acceptance of all the terms therein. Thus an unscrupulous door-to-door salesman (particularly in hire-purchase and insurance contracts) might, by making vague and worthless promises, induce buyers to enter into contracts without letting them appreciate the fact that they are thus committing themselves. The content of the contract may also be ambiguous with respect to its meaning. It is not unusual therefore to find terms which severely limit the guarantee the vendor offers for his product or service under the heading "guarantee

clauses". This leads the ordinary buyer into thinking that he is being given a guarantee while the term in effect denies him any guarantee whatsoever.

Secondly, the standard terms do not always contain the complete terms of the contract. Reference is often made to other terms contained in documents such as catalogues, notices, gazettes etc., which are not usually made available to the "adhering party" to the contract. Unfortunately, such documents usually contain the most important clauses such as exclusion clauses. Hence one party enters into the contract without having full knowledge of its terms.

It has already been seen that, in Cameroon, widespread illiteracy and the nearly complete unawareness of contractual rights, on the part of most parties to standardized contracts makes this problem acute indeed. The problem equally exists in England and France as the section on incorporation of terms into contracts revealed.

A. Doctrine of Notice and Disclosure

Proponents of 'procedural unconscionability' hold that the source of unconscionability is the lack of knowledge of the nature of the terms of the contract. Thus, they cling to the basic bargaining hypothesis of contractual formation and assert that if all the terms of the contract are properly and conspicuously disclosed, it would result in a reasonable allocation of risks since there would thus exist some form of bargaining or, absent that, it would give the adhering party to the contract a basis for exercising any meaningful choice.

The thesis that will be put forward here is that although procedural unconscionability is a component of the unconscionability problem, it is not on its own a sufficient analysis of the entire problem which as will be seen, has more to do with the nature of the market in which the contract is made. Nevertheless, disclosure is clearly very relevant to the issue for as Dauer puts it: "Knowledge or real comprehension of the consequences of a jural act, can be obtained by adequate disclosure. And choice, even in an imperfectly competitive market, can be had by eliminating the lack of knowledge, one of the more insidious of the entropies of monopolies, real or artificial".⁽²⁵⁾

The idea that a contract could be rendered unenforceable because of non-disclosure of its terms or conditions is not new in the law of contract. The doctrine of disclosure has been cardinal in insurance law since Lord Mansfield's decision in *Carter v. Boehm*.⁽²⁶⁾

Although the decision was in an insurance case which has now been recognised to constitute a separate branch of law from the general law of contract, Lord Mansfield felt he was applying a general contract rule. He said with respect to the requirement of disclosure that "the governing principle is applicable to all contracts and dealings"⁽²⁷⁾ and he considered the rule to be drawn from the principles of natural equity. The duty of disclosure is imposed to protect the commercial

25. Dauer, "Contracts of Adhesion in the Light of the Bargain Hypothesis: An Introduction", *S Akron L. Rev.* 1, at 39.

26. 3 Burr 97 English Report.

27. *Carter v. Boehm*, *supra*. at p. 1164.

expectations of good faith and fair conduct in exchange relationships.

The first question to be asked is, under what circumstances must there be a duty to disclose any fact in contract formation? The answer to this question according to Lord Mansfield was simply whenever good faith and fair dealing demanded disclosure. Such an answer is however so broad that it would be without any referents. If one looks at the insurance contract in which a duty of disclosure in the formation process is required, certain facts can be drawn. In the first place, it is a contract with fundamental importance to the parties, in which a lot of money is at risk and it is also important in economic planning. Secondly, an insurance contract is not a simple contract. It is quite complicated and usually demands a level of comprehension over and above that of an ordinary lay person for its terms to be understood. A duty to disclose in any other contract should be predicated upon similar circumstances. It should be a requirement where the contract in question is one which has some considerable bearing on the economic condition of the party concerned. It may be contended that this approach will involve the making of assessments of the economic weight of different contracts which is not an easy thing to do. The important factor in this context is the status of the contracting party for surely the impact of a particular contract, for example a credit contract, will depend on how economically viable the adhering party to the contract is. In Cameroon, among such important contracts are finance contracts, contracts for the sale of agricultural produce which are of particular importance to the rural population and contracts for the sale of expensive household and other items. These are contracts which are also much too complicated for the average Cameroonian to readily grasp their scope and breadth.

Having determined that the duty to disclose should be required only in relatively important contracts, the next question is what sorts of facts have to be disclosed? In this regard, it is necessary to delve into case-law and examine what types of facts have been required to be disclosed. It must be prefaced however that until recently, there has not been a general duty to disclose in contract law since the problem had not acquired the perspective now given it by academics and judges alike. Instead, attempts made to require disclosure took the form of the doctrine of notice. This doctrine was the mainstay in the decision of *Henderson v. Stevenson*.⁽²⁹⁾ In that case, it was held that exculpatory terms contained in a ticket were not necessarily incorporated into the contract. Lord Chelmsford had this to say: "I think that such an exclusion of liability or negligence cannot be established without very clear evidence of the notice having been brought to the knowledge of the passenger and his having expressly assented to it. The mere delivery of a ticket with a condition endorsed upon it is very far, in my opinion, from conclusively binding the passenger". Although couched in the classical manner - i.e. requiring assent- what Lord Chelmsford said is not in substance far removed from a requirement of disclosure. The general rule being that the offeror should bear liability for negligence, he could not be allowed to pass on this onerous responsibility to the passenger without making it clear before the contract was entered into. This approach was unfortunately not followed subsequently, since later the passenger was deemed to have had constructive notice of

29, [1875] L.R. 25.

the terms of the contract.⁽³⁰⁾

Recently however, the doctrine of notice has again surfaced in Anglo-American case law. In *Lacks v. Fidelity & Casualty Co.*⁽³¹⁾ the plaintiff was not bound by the terms of a flight insurance policy he had purchased because he had no notice of its terms and therefore no reason to suspect that his flight would not be covered by the policy.

The American landmark case of *Henningsen v. Bloomfield Motors Inc.*⁽³²⁾ best illustrates the resurgence of the doctrine of notice or disclosure as it is now known. The facts of that case were simple: a saloon car was delivered to Mr and Mrs Henningsen and ten days later, while Mrs Henningsen was driving there was an accident caused by a mechanical defect in the car in which she sustained personal injuries plus extensive damage to the car. The standard form contained two paragraphs in very fine print to the effect that both sides of the standard form made up the contract and the purchaser would be deemed to have read and accepted the terms contained therein. On the back of the form was a warranty clause stating that the manufacturer promised replacing any parts of the car which were defective due to workmanship within ninety days of delivery or before the car was driven four thousand miles, whichever occurred first. Concatenating that warranty was an exclusion of any other warranty,

30. Parker v. South Eastern Railway Co. [1877] 2 C.P.D. 416.

31. 306 N.Y. 357, 118 N.E. 2d 555 [1954]
Also, Steven v. Fidelity Casualty Co. of New York, 27 Cal Rep. 172, 337 2d (1962) 284.

32. N.J. 358, 161 2d 69 [1960].

express or implied. The issues in that case covered the whole scope of the doctrine of unconscionability but the immediate concern is what the court had to say about disclosure. Justice Francis narrowed the controversy in this connection to two essential considerations: were the purchasers sufficiently informed of the nature of the contract before entering into the contract? Secondly, granted that the terms contained in the form sufficiently disclosed the nature of the disclaimer, Justice Francis asked, "...can it be said that an ordinary layman would realise what he was relinquishing in return for what he was being granted?"⁽³³⁾ These questions which in the present case were answered negatively raise an important question - the nature of disclosure. How is disclosure to be made? From the discussion of standard form contracts in the previous chapter it is evident that if there is one place where a manufacturer or salesperson can insert a term which he does not want the purchaser to read, it is in the form, buried within the fine print. Therefore, for disclosure to be effective alternative methods must be envisaged. This point is a fortiori apt in Cameroon where most consumers are not literate. Justice Francis's reasoning in Henningsen gives much consideration to the status of the parties involved in the transaction. The purchaser's level of education, his acquaintance with the type of contract in question are clearly relevant factors. The nature of the disclosure a manufacturer would be required to make to a garage owner should surely not be the same as that to be made to an ordinary purchaser who has little or no knowledge of the market. This is

33. Henningsen v. Bloomfield Motors, loc.cit. at p.92.

particularly so where the term concerns an alteration of risk not normally expected by purchaser as in Henningsen.⁽³⁴⁾

Recently, English courts have followed in the same vein with Lord Denning spearheading this approach. In *Jacques v. Lloyd George & Partners Ltd.*,⁽³⁵⁾ the plaintiff placed his interest in a coffee house up for sale with an estate agent. The contract signed by the plaintiff contained the following term: "(3) Should you be instrumental in introducing a person willing to sign a document capable of becoming a contract to purchase at a price, which at any stage of the negotiations has been agreed by me, I agree to pay you a commission of £200 or 7½% ..." The agent did introduce a willing purchaser and an agreement of sale was entered into but it subsequently fell through because of an intervening factor for which neither party was to be blamed. The agent nevertheless claimed his commission. In deciding the case against the agent, Lord Denning said: "The common understanding of mankind is that commission is only payable by the vendor when the property is sold... If the agent seeks to depart from the ordinary and well understood term, then he must make it perfectly plain to his client. He must bring it home to him such as to make sure that he agrees to it. When his representation produces a printed form and puts it before the client to sign, he should explain its effect to him, making it clear that it goes beyond

34. Such alteration of risk is one which is 'prima facie' unfair which means that the issue of disclosure is not entirely severable from substantive unconscionability.

35. [1968] 1 W.L.R. 625.

the usual understanding in these matters. In the absence of such explanation, a client is entitled to assume that the form contains nothing unreasonable or oppressive. If he does not read it and the form is found afterwards to contain a term which is wholly unreasonable and totally uncertain as this is, then the estate agent cannot enforce it against the innocent vendor".⁽³⁷⁾ Lord Denning appears to be suggesting that the mere inserting of a term in the form is not enough and oral disclosure has to be made. The same result was arrived at in *American Home Improvement Inc. v. MacIver*,⁽³⁸⁾ where a financing contract did not disclose the rate of interest to be paid by the defendant. The decision was however not arrived at solely on the grounds of procedural unconscionability.

The problem of procedural unconscionability has also been the main issue in some recent cases which although apparently decided on the grounds of a general doctrine of inequality of bargaining power, are on a close reading of the facts, arguments and decisions indeed an espousal of the doctrine of disclosure. In the first of that line of cases, *Lloyds Bank v. Bundy*,⁽³⁹⁾ a bank obtained security from a father who was quite advanced in age and had been their long-standing customer, to secure the indebtedness of his son with the bank.

37. *Jaques v. Lloyd George and Partners*, *supra* at pp. 629-630.

38. 105 N.M. 435, 201 A 2d 886 2vcc. Rep. Serv. 235 (1964)

39. [1974] 3 W.L.R. 001, discussed by Slayton, "The Unequal Bargain doctrine: Lord Denning in *Lloyds Bank v. Bundy*". 22 McGill L.J. (1976), p.94.

This was done without disclosing to the father the state of his son's affairs. The security was invalidated by the Court of Appeal. Sachs and Cairns L.JJ. rested their decisions on established rules relating to confidential relationships between banker and customer and the bank's duty of disclosure. Lord Denning however, while subscribing to the arguments above, sought to cast the issue on the broader basis of inequality of bargaining power. He said that such a contract would be invalidated when one party's bargaining power was so grievously impaired by reason of his own needs or desires or by his own ignorance. *Clifford Davis Management Ltd. v. W.E.A. Records Ltd.*⁽⁴⁰⁾ was an appeal against a first instance decision to discharge an interim injunction restraining W.E.A. Records from infringing on the plaintiffs' (i.e. the publishers) copyright in the composition of a group of musicians. Lord Denning not only found that the terms of the contract were unfair, being very one sided, but he attached a lot of significance to the lack of independent advice for the musicians when the contract was entered into. He said at p.69 that the publishers were "skilled in business and finance", the composers were "talented in music and song but not in business. In negotiation they could not hold their own".

Lloyds Bank v. Bundy has been followed in Canada. In *Mackenzie v. Bank of Montreal*,⁽⁴²⁾ the plaintiff brought an action to set aside a mortgage on her farm lands and promises executed by her in favour

40. [1975] 1 W.L.R. 61 (C.A.)

41. [1975] 55 D.L.R. (3d) 641 (Ontario H.C.).

of the defendant bank to secure the indebtedness of a friend of hers. The bank had previously seized the plaintiff's car which had been fraudulently chattel-mortgaged by the plaintiff's friend and it refused to release the car even after having found out who the true owner was. The plaintiff went to the bank with the sole purpose of getting back her car but the bank's credit manager made her sign a number of forms, one of which was the mortgage in issue. Stark J., quoting extensively Lord Denning in *Lloyds Bank v. Bundy*, stressed the fact that no explanations were given to her in connection with the forms she signed. Hence, he concluded that the mortgage could not stand.

On a narrow reading of these cases, one might well say that they turned on undue influence since there was, in all of them, some kind of confidential relationship between the parties. This is not however the case. Lord Denning maintained in *Clifford Davis* that the independent duty of disclosure arose because of the inequality of bargaining power. He did not predicate such a duty on any confidential relationship. It is contended however that the bargaining power element is merely incidental. The heart of the matter is that the parties were not sufficiently informed about the contracts they were entering into and were thus unfairly surprised. The fact that the parties were of unequal bargaining power which is after all to be expected in such contracts was not of great moment.

Certain ramifications derive from these cases. If unequal bargaining power is not the source of this type of unconscionability, neither is the fact that the terms are enshrined in standard forms

a source of the unfairness, and there is indeed no evidence that dickering would result in fairer terms. It may even be a means of achieving price discrimination. The genuine reason for the unconscionability in such contracts is the fact that the profferers allow the other parties to enter into the contracts without giving them the opportunity to understand the full implications of the terms. The contracts are usually couched in arcane legal language and persons who are not used to such language are usually misled. This is particularly the case in complex transactions such as credit agreements, insurance contracts, etc., where the firms do not inform their customers about the nature of the risks they are undertaking. It is therefore only fair that the persons who supply goods in such contracts, being the knowledgeable parties should be required to bring to the notice of those who are less knowledgeable the relevant information they require in order to make rational purchase decisions.⁽⁴²⁾ How possible is it then to carry out this form of disclosure considering the literacy and educational inadequacies of the Cameroonian population? This end has to be reconciled also with the social costs that would inevitably arise in the implementation of such a goal. This problem is compounded by other cultural and psychological factors, such as the absence of any long term planning characteristic of the majority of the consumer population, particularly the poor.

42. Although it is assumed here that it is always the buyer who suffers from the unconscionability of the contract, it could also be the other way round; for instance when small farmers sell their agricultural produce to institutions such as the Marketing Board or middlemen.

For disclosure to be effective in the Cameroonian context, information should be brought directly to the conscious attention of the parties particularly in the pre-contract stage. It is at this stage that information which suppliers know is most likely to influence the purchase decisions of buyers is usually made and, more often than not, such information is given orally. Pre-contract disclosure therefore ought to be made orally. In addition to this form of disclosure, the necessary information should also be inserted in advertisements. Undoubtedly, this proposition is bound to run into difficulties because of the present law of evidence which stipulates that parol evidence is not to be adduced to vary written evidence. This rule therefore has to be abolished when standard form contracts are in issue, so as to protect the adherent's reasonable reliance on the disclosed information. To be sure, abolishing the parol evidence is bound to make the law of evidence not only controversial but also difficult to ascertain. Without attempting to eschew this problem - very much a hot potato - it is submitted that it is not an unreasonable price to pay in order to achieve the higher objective of fairness. This problem can also be obviated by the use of administrative supervision of such contracts. Acquiring information is of little significance if the information cannot be used in changing purchaser behaviour. It may thus be contended that because of the educational and other social disabilities earlier pointed out which exist in Cameroon, disclosure would have little or no impact on general consumer behaviour. This is however not entirely true because there will be, in any event, the presence in the market of some buyers (or sellers as the case may be) who are educated enough

to evaluate the information disclosed rationally and to put it to use. The presence of such buyers therefore protects those who cannot make use of such information since it is not easy for firms to distinguish between these two groups of buyers. Another somewhat persuasive reason for disclosing information lies in the fact that even if it does not influence buyer behaviour, it gives them an opportunity to participate actively in the market, thereby making contracts look fair. This would enhance the faith people have in the fairness of the market. (42a)

It has been suggested that although this fairness argument has some weight, it should not be applied in all situations. (43) It is contended that in a competitive market, it is in the interest of individual firms to fully disclose their terms in order to obtain a larger share of the market since those who offer better terms would obviously capture more customers. This argument requires that disclosure regulation should be imposed only in imperfect i.e. oligopolistic or monopolistic markets, because in such markets it is not in the interest of any of the firms to disclose any of their terms because the rest of the firms would follow suit (i.e. conscious parallelism) and there will therefore be no resulting advantage to

42a. This claim is analogous to the claim that people have a procedural right to a hearing in a contest which would be disadvantageous to them irrespective of any substantive right to be protected. This right is based upon membership of affected persons in the same community. See Michelman, "Formal and Associational Aims in Procedural Due Process", 18 *Nomos* (1977), p. 126.

43. A. Schwartz & Louis Wilde: "Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis", 127 *Univ. of Penn. L. Rev.* (1979) p. 630.

any of the firms. Thus in an imperfect market firms disclose less information about their products than is socially optimal.

It is submitted in the first place that in Cameroon there is a total absence of perfectly competitive markets which involve the use of standard form contracts (this has already been discussed in Chapter One, on economic institutions in Cameroon). Secondly, although a market may be competitive on a national scale, it may not be so in a particular geographical area.

Another line of argument in favour of disclosure regulation derives from the so-called "Coase theorem",⁽⁴⁴⁾ the quintessence of which is that in a zero-transaction cost world, the mutual interests of the parties will naturally lead to the most efficient allocation of resources, i.e. a Pareto optimum. However, because of high transaction costs (i.e. search costs), little or no search is carried out at all before contracting and consequently, there are aberrations in bargaining processes and resources are therefore inefficiently used. It follows therefore that if transaction costs are reduced by means of disclosure regulation, it will tend to take the market towards a Pareto optimum. The corollary to this view is that if disclosure costs are very high, this will offset the benefit to consumers as it may result in even higher prices. The methods of disclosure herein advocated could possibly be carried out without incurring high costs. Secondly, it has been suggested by one commentator that the law could allow for a "cooling off" period during which a consumer may be

44. Coase, R. "The Problem of Social Costs", 3 J. of Law and Economics, (1960), p.1.

entitled to disaffirm a contract within a specified period of entering into the contract.⁽⁴⁵⁾ This is of particular relevance in door-to-door insurance or hire-purchase sales where the parties do not have enough time to reflect on the terms before entering into the contracts. In Cameroon, because of the illiteracy and lack of education that abounds, there is bound to be a great deal of focus on the personal element.⁽⁴⁶⁾ The insistence on conspicuous oral disclosure will therefore aid in educating the population at large.

In *Frostifresh Corporation v. Reynoso*,⁽⁴⁷⁾ the defendant, a Spanish speaking person, was deluded into entering into a hire-purchase contract by the plaintiff's salesman who told him he would be paid a commission on sales to be made to his friends and neighbours. The defendant agreed to purchase a freezer at three times the cost price. It was held inter alia that the defendant was handicapped by lack of knowledge of the commercial situation and "the nature and terms of the contract". The court therefore refused to enforce the contract. In *Williams v. Walker Thomas Furniture Co.*,⁽⁴⁸⁾ the court put the test of

45. M.J. Trebilcock: "The Doctrine Inequality of Bargaining Power: Post Benthamite Economics in the House of Lords", 26 Un. of Toronto L.J. (1976) 359 at 373.

46. Caplovitz in his book, *The Poor Pay More* (The Free Press, 1963) noted that unconscionable clauses are prevalent in East Harlem where there are a plethora of firms doing business. The market is apparently very competitive. This state of affairs must therefore arise from the fact that consumers are too ill-informed and uneducated to act rationally.

47. 52 Misc 2d 26, 274 N.Y.S.2d 268 (Dist ct 1968).

48. 350 F 2d 445 Dc. Civ. [1965].

fairness thus: "Did each party to the contract, considering his obvious education or lack of it, have reasonable opportunity to understand the terms of the contract...?" The Court did not enforce the contract.

The point has to be emphasized that the fact that there are procedural defects in the formation of a contract does not ipso facto invalidate the contract. There must at the same time be an element of substantive unfairness. The concept of procedural unfairness however, has the important function of insulating the contract terms from being adjudged unconscionable. When notice of the contractual terms has been given and their implications clearly made clear within the circumstances to the purchaser, the contract might be shielded from judicial or administrative intervention. This point of view however has serious limitations. It is conditional upon the fact that there is a considerable measure of choice in the relevant market for the buyer if he finds the terms of a particular seller unreasonable. As has been pointed out, this measure of choice hardly exists in the types of contracts concerned in Cameroon. Furthermore, the ability to seek for other alternatives depends to a large extent on the aggrieved party's commercial sophistication: hence, because of the social and psychological conditions that obtain in Cameroon (i.e. illiteracy, lack of planning etc.), disclosure regulation is bound to have only a modest impact unless accompanied by consumer education and other schemes designed to encourage buyers (or sellers) to evaluate and use disclosed information.

While disclosure regulation would not be a panacea for the procedural unconscionability in contracts, it is nevertheless based on sound policy reasons and it is consistent with the new perspective

contract has assumed, i.e. that of a relationship between the various participants in the market.

Where the buyer has no alternative to choose from the conception of procedural unfairness would be largely undercut. In that case, an examination of substantive unconscionability is imperative.

B. Substantive Unconscionability

Supposing all the procedural requirements outlined above are complied with, i.e. clear notice and proper disclosure of the terms of the contract, would this fact preclude any argument to invalidate the contract on the ground of unconscionability?

Professor Leff has pointed out that in the absence of any procedural defect in the formation of the contract outlined above, it is difficult to envisage any unfairness in the outcome.⁽⁴⁹⁾ One commentator⁽⁵⁰⁾ has suggested that a roundabout way of dealing with this problem is to assume that any apparent substantive unfairness or inequivalence in the contract is evidence of some procedural defect. However, it is difficult, if not impossible to have a feel of this apparent inequivalence without resort to what actually happens in the market within which the contract took place.

49. Leff, "Unconscionability and the Code - The Emperor's New Clause", 115 U. Pa. L.R. (1967) 485.

50. Trebilcock, 26 Univ. of Toronto Law Journal, (1976) 359 at 377.

One of the leading opponents of any attempt to formulate any theory of substantive unconscionability is Posner.⁽⁵¹⁾ An analysis of his views will make apparent the flaws in his approach. Posner states that the use of standard form contracts by sellers can only be attributed to two reasons: (1) To avoid the costs involved in negotiating and drafting separate agreements with each purchaser: the innocent reason; (2) A sinister reason - the knowledge that the purchaser has no choice but to accept his terms. He proceeds to say that the sinister reason is implausible because it assumes an absence of competition. He contends that the purchaser has a choice since he may procure better terms from another seller. In saying this, Posner contradicts an earlier statement of his, viz, that not all industries are competitive⁽⁵²⁾. Be that as it may, Posner concludes that "If unconscionability means that a judge may nullify a contract if he considers the consideration inadequate or the terms otherwise one sided, the basic principle of encouraging market rather than surrogate legal transactions where (market) transaction costs are low is badly compromised. Economic analysis, at least, reveals no grounds other than fraud, incapacity, and duress (the last narrowly defined) for allowing a party to repudiate the bargain that he made in entering the contract."⁽⁵³⁾

51. R. Posner: Economic Analysis of Law, 2nd edn. (Little Brown, 1977), p. 85.

52. Posner, at p. 82.

53. Posner, supra. note 51 at p. 87.

In the above quotation, Posner does not even go as far as requiring a duty of disclosure as it has been put forward in the previous section. He rather relies on what Llewelyn characterized as inherently unreliable covert tool, i.e. fraud, duress and incapacity.⁽⁵⁴⁾ Even presuming that Posner's thesis incorporates the duty of disclosure, it is submitted that that would not insulate the contract from being invalidated for unconscionability for two reasons. The first, which has already been canvassed in relation to disclosure is that in the majority of cases, the raw market data disclosed cannot always be meaningfully evaluated by purchasers. The second and more compelling reason is that disclosure does not guarantee a reasonable choice of terms in the market. To be sure, Posner attempts to accommodate this point by acknowledging that, in a monopoly situation, purchasers are compelled to accept the monopolist's terms but he asserts that it is only with respect to price that this argument is relevant and not with regard to the rest of the contractual terms. It is submitted that there is no rationale for his proposition. Choice surely applies to contractual terms as well as to price. Furthermore, in characterizing the problem simply as one of monopoly power (which admittedly comes very much into reckoning), Posner shirks the heart of the matter, i.e. how to deal with standard form contracts in a typical market which is neither entirely monopolistic nor which has a wide latitude of choice.

54. Llewelyn, Book Review,⁵² Harvard Law Review (1939) at p. 703.

Another line of argument in connection with substantive unconscionability has been fostered by commentators whom Rotkin calls "adhesionists".⁽⁵⁵⁾ They do not see the problems arising from standard form contracts as merely procedural. While accepting that disclosure regulation alone is insufficient, the solutions they proffer are fatally flawed essentially because they focus their criticisms mainly on the fact that standard form contracts are used. The question of choice is not looked at from the perspective of the market in which the contract is made. They instead look at it merely from the point of view of inequality of bargaining power, i.e. because the purchasers does not possess enough bargaining power to alter the terms of the contract. Slawson for example insists that when it cannot be shown that a purchaser clearly assented to a particular term, to be enforceable, such a term must conform to democratic standards. He therefore seeks to solve the problem by reference to assent, an approach which is different from the disclosurist approach in degree only because he defines assent very narrowly.⁽⁵⁶⁾ His reference to democratic standards leaves the issue open since he does not determine what these standards should be. It is surely in order to arrive at such standards that any meaningful analysis has to be focussed on the market.

55. Rotkin: "Standard Forms, Legal Documents in Search of An Appropriate Body of Law". Arizona State L.J. (1977) p. 559 at 607.

56. Slawson: "Standard Form Contracts and Democratic Control of Law Making Power", 84 Harv. L. Rev. (1971) p. 529.

The same criticisms plague Murray's analysis.⁽⁵⁷⁾ He turns the whole question of unconscionability on risk allocation. If a risk imposed by the contract on either of the parties is expected, then all is well with the contract. If on the other hand it is not expected, then the court has to revise the contract.

The flaw with this approach is that by confining the question whether a risk is expected or not within the parameters of a particular contract only, one runs the risk of arriving at decisions which are at complete variance with the market situation.⁽⁵⁸⁾

A classic illustration of the pitfalls of the adhesionist approach is the House of Lords decision in *Macaulay v. Schroeder Publishing Co. Ltd.*⁽⁵⁹⁾ In that case, the plaintiff songwriter entered into a contract with the defendants - music publishers for a five year term during which the plaintiff assigned the copyright to all his songs to the defendant for a consideration of 50% of the net royalties received by the defendants whenever the songs were published. The contract contained a clause for automatic renewal for a further period of five years if plaintiff's share of the royalties exceeded £5000 during the first term of the agreement. The defendant could terminate or assign the contract without the plaintiffs consent simply by giving the latter one month's notice. The House held that the contract was against public policy,

57. Murray, "Unconscionability, Unconscionability" 31 Un. of Pitts. L. Rev. (1961), p.1.

58. Murray's approach is similar to that of Spanogle: "Analysing Unconscionability problems" 117 Un. of Pennsylvania L. Rev. (1969), p. 931.

59. [1974] 1 W.L.R. 1308.

being in restraint of trade. This decision was however cast within the broader grounds of unconscionability. Lord Diplock's analysis is in no way limited to restraint of trade and in a similar case, Lord Denning said⁽⁶⁰⁾ that Lord Diplock's reasoning afforded support for the inequality of bargaining power doctrine which he, Lord Denning, put forward in *Lloyds Bank v. Bundy*.⁽⁶¹⁾ In describing the issue in contention, Lord Diplock said: "What your Lordships have in fact been doing has been to assess the relative bargaining power of the publisher and the songwriter at the time the contract was made and to decide whether the publisher had used his superior bargaining power to exact from the songwriter promises that were unfairly onerous."⁽⁶²⁾

Secondly, Lord Reid, doubting whether the doctrine of restraint of trade is applicable to such exclusive contracts, said "if contractual restrictions appear to be unnecessary or reasonably capable of enforcement in an oppressive manner, then they must be justified before they can be enforced".⁽⁶³⁾

Lord Diplock went out of his way to establish the philosophical underpinnings of his reasoning in a passage which is worthy of elaborate quotation. He said: "It is, in my view, salutary to acknowledge that in refusing to enforce the provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to refrain from exploiting his own earning power, the public policy which the court is implementing is not some 19th century theory about the benefit

60. *Clifford Davis Management Ltd. v. W.E.A. Records Ltd.*, [1975] 1 AER, 237

61. *Lloyds Bank v. Bundy*, *supra* at note 39.

62. *Macaulay*, *supra* at p. 1315.

63. *Ibid* at p. 1316.

to the general public of freedom of trade, but the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable. Under the influence of Bentham and of laissez-faire the courts in the 19th century abandoned the practice of applying the public policy against unconscionable bargains to contracts generally, as they had formerly done to any contract considered usurious; but the policy survived in its application to penalty clauses and to relief against forfeiture and also to the special category of contracts in restraint of trade. If one looks at the reasoning of 19th century judges in cases about contracts in restraint of trade one finds lip service paid to current economic theories, but if one looks at what they said in the light of what they did, one finds that they struck down a bargain if they thought it was unconscionable as between the parties to it and upheld it if they thought it was not.

So I would hold that the question to be answered as regards a contract in restraint of trade of the kind with which this appeal is concerned is 'was the bargain fair?' The test of fairness is no doubt whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract. For the purposes of this test all the provisions of the contract must be taken under consideration."⁽⁶⁴⁾

64. Ibid at p. 1316.

It is difficult to fault Lord Diplock's analysis. However, what test of fairness did the House offer to buttress their decision? Their Lordships all agreed with Lord Reid's analysis on this point. In holding the contract unfair, he relied on three arguments. First of all, he thought that the five year duration of the contract was too long for the plaintiff because he might well become popular and yet remain tied to the defendant for a period of up to ten years. He referred to clauses 9 and 16 of the contract which stipulated that the plaintiff was bound to let the defendant only publish his works without a corresponding duty on the defendant to publish them. He said "it appears to me to be an unreasonable restraint to be the composer for this period of years so that his work will be sterilised and he can earn nothing from his abilities as a composer if the publisher chooses not to publish".⁽⁶⁵⁾

Finally, he argued that although there are some established composers who can bargain on equal terms with publishers, the plaintiff in this case was a yet unknown musician who had to submit to the oppressive terms of the defendants.

Since a lot of stress was laid on the duration of the contract, it has to be emphasized that its reasonableness or fairness can only be appraised by examining the entire contract, including the consideration received by the composer. This included a *bona fide* promise of promotion of the plaintiff's songs, special royalty agreements on foreign publications and access to foreign markets. Indeed, the fact that the agreement was in its second term and that the songwriter had

65. Macaulay, note 59 at 1313-1314.

become famous is evidence that that promise had been carried through. By failing to take these facts into consideration, there was no context within which the duration of the contract could be rationally deemed unconscionable. The underlying assumption of the mainstay of Lord Reid's judgement, i.e. that the defendant could if he so pleased, simply shelve the plaintiff's songs without incurring a breach of contract is without any commercial foundation and his Lordship indeed hinted that such a conclusion was perverse. His only reason for that assumption, and a very speculative reason at that, was that "He (i.e. the publisher) might think it likely to be more profitable to promote work by other composers with whom he had agreements and unwise or too expensive to try to publish and popularise the respondent's work in addition. And there is always the possibility that less legitimate reasons might influence a decision not to publish the respondent's (plaintiffs) work". Surely, it is not nearly enough to rest a judgement upon such a hypothetical situation which imputes such commercial bad faith on the publisher and for which above all there was no scintilla of evidence. Indeed, there was evidence to show that the publisher had fully and properly carried out his part of the bargain.

On Lord Reid's final point, one may reasonably presume that it follows as a matter of course that a well established and known musician would be in a position to exact better terms from a publisher than an unknown musician as the plaintiff then was.

If one looks at the market within which that contract took place, a number of facts come out. In the first place, the music industry is not at all oligopolistic as statistics show. The Billboard's

1975-76 International Buyer's Guide lists 428 U.K. music publishers which suggests that the industry is quite competitive. The publishers in question were by no means one of the giants of the industry since the company was made up of only two shareholders - a man and his wife. Furthermore, there was no evidence to suggest that there was any cartelization in the industry which prevented the songwriter from seeking alternative terms elsewhere. On the contrary, from a study of the music industry carried out in 1964,⁽⁶⁶⁾ "the record industry has been characterized by chaotic distribution and intensive competition which in many instances result in minimal profits". The authors further found out in the same survey that only 23.7% of free singles distributed to U.S. radio stations were played more than once and up to 61.6% were never played at all. This points to the risks involved in the business, risks which are greater still when one signs an unknown musician because he might not turn out to be a success. It is with this background that one surely ought to evaluate the terms of the contract. In *Clifford Davies Ltd. v. W.E.A. Records Ltd.*,⁽⁶⁷⁾ Lord Denning adopted Lord Reid's approach. While admitting that the royalty agreement's reached between the parties were fair enough, he went on to hold that the contract contained some "amazing provisions" by which he meant the duration of the contract (which was similar to the provision in *Macaulay*). He observed that "it may be said that there was such inequality of bargaining power that the agreement should not be enforced."⁽⁶⁸⁾

66. Bretter, in Taubam, (ed.), The Business and Law of Music (1965), p.8.

67. Note 60, supra.

68. At p. 241.

Thus, the reason for holding that the duration of the contract was too long was because of the gross disparity in bargaining power. The ambiguity given to the unequal power doctrine makes it possible for the courts to use it when indeed the decision should have been reached on the ground of substantive unconscionability. Arguments grounded on this concept are bereft of any sound, factual analysis of the market situation within which the contract was concluded and the cases above bear this out. The point being emphasized here is not that the contracts under consideration were fair, but rather, that not a shred of evidence was adduced to show that the contracts were unfair, in terms of what the market situation was. This was the result of deciding the problem of substantive unconscionability by confining judicial scrutiny within the parameters of the contract only. If courts had to scrutinise every contract in which bargaining power was unequal, all but a few contracts will be subject to such scrutiny. Furthermore, the proponents of the unequal bargain theory have yet to determine the extent to which bargaining power has to be unequal for the substantive imbalance of the contract to be attributed to it.

At the risk of overemphasizing, it should be pointed out that whether one is dealing with a small firm or a large one, the standard form conforms typically with the current impersonality of present exchange relationships instead of being inimical to it. If oppression exists in the forms, the cause must therefore be something other than failure to bargain. Consequently, to eradicate unconscionable terms in standard contracts, one must square the terms, including price, to the actual market situation.

Kessler suggested nearly forty years ago that the cause of unconscionable contracts lies in market concentration and the existence of monopoly power.⁽⁶⁹⁾ This view has not gone uncontested. Schwartz⁽⁷⁰⁾ maintains that the above conclusion is not necessarily true because even monopolists wish to increase demand and as such, they have to satisfy consumer preferences. He contends that if buyers prefer one set of terms to another, it is in the interest of the monopoly to supply these terms. From this premise, he maintains that if buyers buy a monopolist's products it is because they prefer the terms he imposes. Even at face value, this theory hardly holds water. It is impossible to maintain that buyers prefer the monopolists' terms when in fact they do not have any alternative. Secondly, sellers, monopolists included, often mistake buyer preferences. Schwartz however holds that even if sellers do not get buyer preferences right, courts which do not have the necessary market data are less likely than monopolists in ascertaining buyer preferences, hence, their attempts to alter or invalidate a monopolists' terms are conceptually doomed. This argument is predicated upon the assumption that only courts can intervene, but this is not necessarily true. However, even if this assumption was true, it should not preclude an attempt to investigate whether the contract is fair or not as this is a matter of doing justice. Schwartz further argues that Kessler's proposition bears very little relevance to the problem of substantive unconscionability because true monopolists are a rarity.⁽⁷¹⁾

69. Kessler, "Contracts of Adhesion: Some Thoughts About Freedom of Contract"; 43 Col. L. Rev. (1943) 629.

70. A. Schwartz: "Seller Unequal Bargaining Power and the Judicial Process", 49 Indiana L.J. (1974), p. 366 at p. 380.

71. That is far from the case in Cameroon where monopolies dominate such fields as the supply of electricity, water, marketing of agriculture produce, the issuing of certain kinds of credit, etc.

To him, oligopolies pose the real problem.

This is not the place to delve into a study of oligopoly but it is necessary to define what is meant by oligopolistic market or price in order to put the views canvassed into proper perspective. The terms oligopolistic market refers to:

(1) A type of industry structure which may roughly be said to contain only a few sellers; (2) A certain kind of seller behaviour and (3) A certain kind of price.⁽⁷²⁾ This definition does not suggest any operational definition of oligopolistic pricing. The distinctive characteristic of oligopolistic pricing is the "assumption that the seller whose pricing decision is being investigated considers the possibility that his competitors' responses to his price may be influenced by their expectations about the way in which he would react to their responses".⁽⁷³⁾

The conventional assumption that derives from this fact is that oligopolistic pricing misallocates resources, i.e. by decreasing the unit output of the firm engaging in the practice. If this is true, it follows that oligopolistic pricing reduces economic welfare, since the resulting prices are above what they ought to be. Serious difficulties however lie in the area of identifying oligopolistic pricing. Professor Turner thinks that this requires probing into marginal costs of firms and also into the problems posed by joint costs. Such an enquiry would not only be too difficult but also too expensive for the courts to carry out.⁽⁷⁴⁾ Posner on the other hand holds that

72. See Stigler, "A Theory of Oligopoly", 72 J. of Political Economy, (1974) p. 44.

73. Markovits, "Oligopolistic Pricing Suits, the Sherman Act and Economic Welfare (Part 1)" 26 Stanford L. Rev. (1974) 493 at 498.

74. Turner, "The Definition of Agreement Under the Sherman Act. Conscious Parallelism and Refusals to Deal", 75 Harv. L. Rev. (1962) 655 at 670.

such an enquiry may be conducted on relatively very inexpensive and less difficult lines, to which he cites inter alia, the practice of price discrimination, the realisation of abnormally high profits and the presence of prolonged excess capacity.⁽⁷⁵⁾

The stress on monopolistic and oligopolistic pricing should not lead to the assumption that any other price otherwise arrived at is the competitive and fair price.⁽⁷⁶⁾ The question then is, how can one determine what an unconscionable price generally is? In this connection, a cursory analysis on how a competitive price is arrived at is necessary. The most theoretical model, that of "tonnement" assumes that there is an energetic auctioneer calling out prices of goods in the market and agents responding to those prices.⁽⁷⁷⁾ Following that mechanism, equilibrium prices will only occur when all the agents' decisions are compatible with the price at which all exchanges should occur and no single agent will be able to determine the price of the goods. Needless to say, no market behaves in that manner. "People buy even at non-competitive prices. Although economic models act as guidelines to what a competitive price should be, human behaviour is obviously too complex to be encapsulated in these models. As it has been earlier

75. Posner, "Oligopoly and Antitrust Laws: A suggested Approach", 21 Stan L. Rev. (1969), p. 1562 at pp. 1578-82.

76. See Caplovitz, The Poor Pay More (The Free Press, 1963) p. 12.

77. K. Arrow & F. Hahn, General Competitive Analysis (Holden-Day, Oliver and Boyd, 1971).

pointed out information about alternative prices or terms may be non-existent and this factor contributes in intensifying market imperfections.

As a component of substantive unconscionability, it is evident therefore that price is much more complex than the traditional approach of unequal bargaining power makes out. In the case of a monopolistic or oligopolistic market, there are no alternative prices to compare a particular contract price with and as such economic analysis into price has to be resorted to if any meaningful decisions have to be arrived at.

Even a simple comparison of prices where it can be done is not satisfactory since in the first place, it poses a problem about the geographical definition of a market.⁽⁷⁸⁾ Secondly a simple comparison of prices undermines the fact that accompanying terms are usually different, for example certain credit terms may be more stringent than others. In this connection, the cases illustrate that low income purchasers are particularly subject to such unconscionable contracts.

In *Williams v Walker-Thomas Furniture Co.*,⁽⁷⁹⁾ an instalment sale contract made with a lady of very limited means contained an "add-on-clause" which provided that payments made by the purchasers "shall be credited pro-rata on all outstanding leases, bills and accounts due" in order

78. In Cameroon, because of the very inefficient transport system, there are acute disparities of prices of a particular good even between markets which are geographically not far apart.

79. 350 F. 2d 445 D.C. Cir (1965).

"to keep a balance due on every item purchased until the balance due on all items whenever purchased, was liquidated". One might intuitively assume that such a clause is unreasonable and indeed, the court held that it was a "commercially unreasonable contract". Because of the frugality of the courts' exposition, it did not spell out why the clause was deemed unreasonable.

Professor Leff however thought the clause was commercially reasonable, while Braucher in his commentary stated that "such clauses are forbidden in any respectable retail instalment sales law and should be held unconscionable in any contract for the purpose of consumer goods, not expected to produce money income for the consumer."⁽⁸⁰⁾

As Epstein points out, it is ludicrous to think of hypothetical clauses that have never appeared in contracts in order to substantiate the striking down of contractual terms.⁽⁸¹⁾ He cites an example given by Murray⁽⁸²⁾ that: "The parties hereby agree that during the first year of operation of this automobile, should the automobile be operated on any Tuesday afternoon by a party wearing a red neck-tie, all rights in the automobile will be forfeited by the owner and ownership of the

80. Leff, "Unconscionability and the Code", note 25, *supra*.
Braucher, "The Unconscionable Contract or Term", 31 *Univ. of Pitts. L. Rev* (1970) 337 at 343.

81. Epstein, "Unconscionability: A Critical Reappraisal", 18 *J. of Law & Econ.* (1975) p.293.

82. Murray, J.E. Murray on Contracts, (1974) 746.

automobile will revert to the seller". It is clear that no such clause can find its way into a contract. Hence in determining what terms should be held unconscionable, discussion has to be related to specific contracts in Cameroon already examined. Suffice it to say now that clauses which are designed to protect the seller absolutely in any event and which shift the entire financial risk on the buyer in order to secure maximum profits for the seller should be held to be unconscionable.⁽⁸³⁾

Thus, even with respect to contractual terms other than price, the market has to be examined. In *Henningesen v. Bloomfield Motors*,⁽⁸⁴⁾ the court found that there was little or no warranty competition largely because of the concentration of the motor industry as it existed in the United States. As Kornhauser cogently put it, "the existence of oppressive terms in the form or the charging of exorbitant price may reflect not the imperfections over terms between buyer and seller but the imperfections of the market mechanism. Economic agents have been supplied with inadequate or incorrect information; rational responses in this environment; whether intended to maximize profits or to optimize utility within a budget constraint, do not lead to optimal results. Even in the presence of bargaining or the absence of unfair surprise and advantage, the market would not supply the right goods at the ideal (competitive) price to all consumers because the malfunctions do not lie in the two-person interactions but in the more complex movements of the market as a whole."⁽⁸⁵⁾

83. The seller has the possibility of spreading such risks through insurance.

84. Note 22, *supra*.

85. Kornhauser, L.A. "Unconscionability in Standard Forms", 64 Calif. L.R. (1976), 1151 at 1179.

An entirely new dimension could be added to the principle of unconscionability.⁽⁸⁶⁾ Unconscionability may have a tortious element. An example is the practice by some door-to-door salesmen of peddling expensive household items, especially on hire-purchase to purchasers whom they know can ill afford them. At the back of the minds of such salesmen is the fact that after the payment of the down-payment and a few instalments repossession of the goods can be had for subsequent non-payment. Surely, such conduct should constitute a civil wrong. It is analogous to a fraud based on a contract.

Conclusion

The principle of unconscionability therefore broadly serves at least three functions:

- (1) To restore to a party what the other has unjustly obtained at his expense, particularly when an unconscionable price has been paid for in a contract. The price may then be reduced as appropriate.
- (2) To give a party what the other has promised him. This applies where a party has been deluded into entering in a contract on the oral representations of the other party and without adequate disclosure of the contract terms.
- (3) Finally, to prohibit or deter the future inclusion in contracts of unconscionable terms or prices. This is the aspect of unconscionability which takes a tortious dimension. It is not nearly enough for the law to invalidate unconscionable contracts if they can be repeated. The most appropriate remedy in this case would be an injunction against the

86. See D.B. King, "The Tort of Unconscionability: A New Tort for New Times", 23 St. Louis Univ. L.J. (1979) 92.

unconscionability sought to be restrained (whether with respect to price or term; an example of this is price control legislation).

As it has been abundantly pointed out and as the cases examined show, courts have decided the issue on the ground of unequal bargaining power in lieu of engaging in economic analysis. What the above analysis demonstrates is the need for regulation of business practices. If to establish the unconscionability of a particular clause the litigation model is used, ie, enforcement only via the courts, there will have to be at least one law suit in order to create a precedent in every aspect of unconscionability. Businessmen may if they wish, litigate the issue to the hilt because they have the wherewithal to do so, while purchasers cannot. Consequently, very few cases indeed will be brought. Even if an issue is litigated upon, the decision has a bearing on the conduct of other sellers if and only when other purchasers who have bought goods or services on similar terms are willing to litigate also, a very unlikely event indeed. Furthermore, as Leff⁽⁸⁷⁾ points out, "litigation merely adjusts a particular contract while the target, as has been emphasized, is the market. He therefore advocates legislation that will give an administrative body powers to supervise contracts. Only through this channel can purchasers be adequately protected against unconscionable contracts (this encompasses not merely unconscionable terms or prices but also sales techniques.

The recently enacted legislation of four European countries in this connection, recently enacted will be looked at in the next Chapter. The last chapter will consider the elaboration of legislation dealing with this problem in Cameroon.

87. Leff, "Unconscionability and the Crowd: Consumers and the Common Law Tradition": 31 Univ. of Pittsburgh L. Rev. (1970), p. 349.

CHAPTER SIX

A COMPARATIVE REVIEW OF RECENT LEGISLATION DEALING WITH STANDARDIZED CONTRACTS

It has already been seen that although the courts in England and France delineated the problems concomitant with the use of standardized contracts, they never quite developed a consistent theory in dealing with these contracts. Since the seventies, most jurisdictions increasingly realised that the only solution to this problem had to come through legislation. An analysis of the problem of unconscionability, undertaken in the last chapter shows that this problem is indeed complex and Parliament was therefore the appropriate instrument of change.

This chapter will review the different legislative approaches in this connection by four European jurisdictions. As the previous chapters have shown, English and French legislation is of immediate concern; the German and Swedish legislation is also examined because it reveals interesting ways of dealing with the problem of unconscionable standardized contracts.

Section I: Recent Legislation in the United Kingdom

English law has focused on exclusion clauses as the central issue in standardized contracts.⁽¹⁾ The problem of disclosure, itself related to the problem of exclusion clauses, has also been dwelt upon by the

1. See Levison v. Patent Steam Carpet Cleaning Co. Ltd. [1977] 3 A.E.R. 498.

courts. Because of the hesitancy of the courts in dealing with exclusion clauses, it was inevitable that Parliament should act. Before discussing the Unfair Contract Terms Act, 1977, it is necessary to look at certain other pieces of legislation enacted before the Unfair Contract Terms Act, which dealt with various aspects of standardized contracts.

A. Background Legislation: Because consumers have been the main victims of standardized contracts, most legislation has been designed to deal with consumer contracts. In 1973 and 1974, two Acts were passed to deal with consumer contracts. The first, *The Fair Trading Act, 1973*, set out to deal with certain undesirable "consumer trade practices", i.e. procedural unconscionability in relation to consumer contracts.

The most important aspect of this Act is the creation of two administrative bodies which have been given the task of regulating business practices in connection with consumers. The first is the Office of Fair Trading⁽²⁾ which is headed by the Director General of Fair Trading. S. 2(1)(a) of the Fair Trading Act gives the Director General the duty to keep under review commercial practices that may adversely affect the economic interests of consumers. Instances of such practices are enumerated in S.17(2). They must be practices which are likely to have any of the following effects:⁽³⁾

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2. Curiously, the Office of Fair Trading is not mentioned in the Act. It is presumed that the Director General must have a staff and office to perform his functions.
 3. Smith & Swain: Protecting The Consumer, (Martin Robertson, Oxford, 1979), p. 25.

- (a) misleading consumers as to their rights and obligations under relevant consumer transactions, or withholding information about such rights, or an adequate record of them; or
- (b) otherwise misleading or confusing consumers with respect to any matter; or
- (c) subjecting consumers to undue pressure to enter into a transaction; or
- (d) causing the terms and conditions of a transaction to be so adverse to the consumer as to be inequitable.

S.13 defines a 'consumer trade practice' very broadly and it may relate to price, conditions and warranties; promotion of goods (advertising etc.), methods of salesmanship; methods of securing payment; and even the packing and labelling of goods.

As has earlier been mentioned, there is a great deal of stress laid on procedural unfairness. The Director General may, on discovering any such practice, refer to the Consumer Protection Advisory Committee, created by S.3 of the Fair Trading Act.

The Committee is an independent body. Its functions are advisory only; thus, the Secretary of State for Prices and Consumer Protection may give effect to its recommendations, but he is not obliged to do so. The committee consists of between ten and fifteen members appointed by the Secretary of State and they investigate any reference made to them by the Director General of Fair Trading. If the Committee finds that any consumer trade practice actually adversely affects the economic interest of the consumer, it may recommend the prohibition of such a

practice or may endorse any proposals made by the Director General.⁽⁴⁾ This recommendation is then transmitted to the Secretary of State who may then make a statutory order putting the recommendations in force. One order was made in 1976: The Consumer Transactions (Restrictions on Statements) Order 1976 No. 1813. This order was the upshot of references made to the Advisory Committee in 1974, which covered the practices of some shops of informing the consumer by the use of displayed notices or other types of exemption clauses that no money would be refunded, or otherwise misleading the consumer. This order was deemed necessary because although such clauses are void under statutes such as the Supply of Goods (Implied Terms) Act (and now, the Unfair Contract Terms Act), and also under the Consumer Credit Act (1974), the mere fact that they are inserted in notices or documents may, in practical terms, lead consumers to refrain from pursuing their legal rights. It has now become unlawful to make such statements.

The *Consumer Credit Act 1974*⁽⁵⁾ is another striking example of a legislative attempt to deal with some of the injustices resulting from the use of standardized contracts. S.8 of the Act limits the application of the statute to:

- (1) "A personal credit agreement ... between an individual ("the debtor") and any other person ("the creditor") by which the creditor provides the debtor with credit of any amount".

4. Fair Trading Act, S.21.

5. This Act implemented most of the recommendations of the Crowther Committee on Consumer Credit which began its work in 1968 and published its Report in March 1971 (Cmd 4596, HMSO, London).

- (2) "A consumer credit agreement is a personal credit agreement by which the creditor provides the debtor with credit not exceeding £5,000.

The Act also covers consumer hire agreements as defined by S.15, i.e., those capable of subsisting for more than three months and which do not require the hirer to make payments exceeding £5,000.

The Act contains several provisions requiring the disclosure of information prior to the signing of the credit agreement. S.55(1) provides a regulation-making power specifying information that has to be disclosed. Ss.60-64 go as far as giving the regulation-making body power to prescribe the form and content of the documents that must be used, even the size of the print may be prescribed.

S.67 also gives the debtor to the credit contract a cooling-off period of five days after receiving the statutory second copy of the agreement. During this period, he may withdraw from the transaction. This can however be done when two conditions are fulfilled: that the negotiations prior to the contracts contained oral representations made by the creditor, and secondly that the agreement was concluded in a place other than the business premises of the creditor.

Ss. 137-140 of the Consumer Credit Act contain provisions protecting consumers against extortionate bargains. A credit agreement is exorbitant if, according to S.138(1), 17:

- (a) "requires the debtor or a relative of his to make payments (whether unconditionally, or on certain contingencies) which are grossly exorbitant, or

(b) "otherwise grossly contravenes the ordinary principles of fair dealing".

In determining this, the court considers a number of factors, among which are: the prevailing interest rates (at the time the credit was given), the age, experience, business capacity and state of health of the debtor, the financial pressures on the debtor, whether a colourable cash price was quoted for any goods or services included in the credit bargain, the degree of risk accepted by the creditor, his relationship with the debtor.⁽⁶⁾

A further important aspect of the Consumer Credit Act is the protection of defaulting debtor. Such protection is enshrined in the Hire-Purchase Act 1965, Part III of which contains provisions restricting the owner's right to re-possess goods when one-third of the hire-purchase instalments have been paid.⁽⁷⁾ In such a case only a court can order re-possession. Should the owner contravene this provision, S.34(2) of the Hire-Purchase Act 1965 stipulates that the hirer or his guarantor becomes entitled to all the sums of money already paid under the contract.

This protection has been extended by the Consumer Credit Act. S.87(1) of the Act requiring the creditor to serve a default notice of seven days if he is contemplating termination of the agreement. S.88 makes this notice compulsory. This of course means that the defaulter is given time to make the repayments due. S.92(1) reiterates the position taken by the Hire-Purchase Act 1965 by stating that:

6. See S.138 of the Consumer Credit Act, 1974.

7. S. 33 of the Hire-Purchase Act, 1965.

"Except under an order of the court, the creditor or owner shall not be entitled to enter any premises to take possession of goods subject to a regulated hire-purchase agreement, regulated conditional sale agreement or regulated consumer hire agreement".

This provision means that in the absence of a court order, the creditor cannot at any time, repossess the goods against the will of the debtor. With respect to the sale of goods, Ss. 12, 13 and 14 of the Sale of Goods Act 1893^(7b) have been the cornerstone of contractual protection of consumers. However, S.55 of the same Act whittled down the effect of those provisions by making it possible for those provisions to be excluded. The Supply of Goods (Implied Terms) Act 1973 amended Ss. 12, 13 and 14 of the Sale of Goods Act 1893. S.4 of the Supply of Goods (Implied Terms) Act 1973 also restricted the possibility of excluding implied terms under S.55 of the Sale of Goods Act. These provisions have now been re-enacted in the Unfair Contract Terms Act 1977.

B. The Unfair Contract Terms Act 1977

This Act is by a long way the most important piece of legislation yet to deal with the problem of standardized contracts. In 1977, Lord Denning who has spearheaded the movement to protect weaker parties in contracts, described it as "a gratifying piece of Law Reform."⁽⁸⁾ The Act does not however address itself to the general problem of

7b. See Sale of Goods Act, 1981.

8. Levison v. Patent Steam Cleaning Co. [1978] 1 Q.B. 69 at 79.

unconscionability in contracts, confining itself largely to one aspect of unconscionability: the problem of exclusion clauses. Hence the existing law in connection with other aspects of contract remains untouched. However, as one commentator says, because the Act gives very wide powers to judges to regulate standard form contracts, it is possible that they might adapt their manner of looking at other aspects of such contracts to the way the Act deals with exclusion clauses.⁽⁹⁾

The Act does not cover every contract with exclusion clauses. It applies only to contracts excluding or limiting business liability which is defined in S.1(3) as obligations and duties arising:

- (a) "from things done or to be done by a person in the course of a business (whether his own business or anothers); or
- (b) "from the occupation of premises used for business purposes of the occupier".⁽¹⁰⁾

Secondly, Schedule I of the Act excludes contracts relating to insurance, land, patents, trade marks, copyrights, companies, securities, marine salvage or storage, charterparties of ships or hovercraft, carriage of goods by ship or hovercraft. Furthermore certain provisions of the Act apply only when one of the parties contracts as a consumer. S.12(1) states that a person is a consumer if

- (a) "he neither makes the contract in the course of a business nor holds himself out as doing so; and

9. Atiyah, Introduction to the Law of Contract, 3rd edn. (Clarendon Press, Oxford, 1981).

10. Private transactions are thus excluded. This appears to be redundant since private contracts hardly ever contain such exclusion or limitation clauses anyway.

- (b) the other party makes the contract in the course of business; and
- (c) "... the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption"

This last provision is bound to be problematic. Certain goods, such as video recorders and cassettes, are mostly sold to non-private buyers. Does this fact mean that any person buying such a good is outside the purview of some of the provisions of the Act? Conversely, if a shop-keeper for example, buys an ordinary consumer goods such as a gas fire for example for his shop, it seems that from the above definition he cannot get the protection of some of the statutory provisions.⁽¹¹⁾ Goods may be bought partly for business and partly for private use. S.12(3) however states that it is for those claiming that a party does not deal as consumer to show that he does not".

The effects of the provisions of the Act are two-fold. Some provisions render certain exclusion clauses entirely ineffective; others subject certain exclusion clauses to the requirement of reasonableness.

(a) Ineffective Provisions

Liability for negligence: S.2(1) of the Act states that "A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence". This is the most sweeping reform to be made by the Act. The application of this sub-section is not restricted in any way. It is useful to note that by S.1(1), "negligence" covers not merely negligence in the performance

11. Lawson, Exclusion Clauses (Oyez Publishing, London, 1978), p. 97.

of a contractual duty, but also the tort of negligence generally and the common duty of care imposed by the Occupier's Liability Act 1957. Even before the Act, it was never very easy excluding such liability.⁽¹²⁾ The courts required such clauses to be specifically drawn to the attention of those entering into the contract. Now, no such devices are any longer necessary since such clauses are declared void by statute.

Secondly, manufacturers' and retailers' "guarantees" have also come under the regulation of the Act. S.5(1) states that: "In the case of goods of a type ordinarily supplied for private use or consumption, where loss or damage:

- (a) arises from the goods proving defective while in consumer use; and
- (b) results from the negligence of a person concerned in the manufacture or distribution of the goods,

liability for the loss or damage cannot be excluded or restricted by reference to any contract term or notice contained in or operating by reference to a guarantee of the goods."

(2) For these purposes:

- (a) goods are to be regarded as "in consumer use" when a person is using them, or has them in his possession for use, otherwise than exclusively for the purposes of a business; and
- (b) anything in writing is a guarantee if it contains or purports to contain some promise or assurance (however worded or presented) that defects will be made good by complete or partial replacement, or by repair, monetary compensation or otherwise.

12. See Thornton v. Shoe Lane Parking [1971] 2 W.L.R. 585.

Hence, guarantees can only add to common law rights of the consumer. They can never limit those rights; any clause in a guarantee purporting to do so will be declared void.

Sections 6 and 7 also render void any clauses seeking to exclude any terms implied by law. S6(1) states as follows:

"Liability for breach arising from

(a) section 12 of the Sale of Goods Act 1893 (Seller's implied undertakings as to title, etc.);

(b) section 8 of the Supply of Goods Act (Implied Terms) Act 1973 (the corresponding section relation to hire-purchase), cannot be excluded or restricted by reference to any contract term".

(2) "As against a person dealing as a consumer, liability for breach of the obligations arising from

(a) section 13, 14 or 15 of the 1893 Act (seller's undertakings as to conformity of goods with description or sample, or as to their quality of fitness for a particular purpose);

(b) Section 9, 10 or 11 of the 1973 Act (corresponding things in relation to hire-purchase);

cannot be excluded or restricted by reference to any contract term".

In this case, the invalidity of such an exclusion will be declared irrespective of whether it is a private sale. This protection is however only given to a person dealing as a consumer. Section 7(2) on its part stipulates that "As against a person dealing as a consumer, liability in respect of the goods' correspondence with description or sample, or their quality or fitness for any particular purpose, cannot be excluded or restricted by reference to any such term". This subsection is unequivocal. It replaces Ss. 1-3 of the Supply of Goods (Implied

Terms) Act 1973. Schedule 4 of the 1977 Act repeals S.55(3) of the Sale of Goods Act and S.12(2) of the Supply of Goods (Implied Terms) Act.

There has been criticism of the above-mentioned provisions of the Act. Professor B. Coote for example, in similar fashion to his earlier criticism of the judicial approach to exclusion clauses,⁽¹³⁾ contends that the underlying assumption of the Act is that exclusion or limitation clauses are merely defences and that they do not in fact determine the proffering party's liability in the first place. He contends that this is wrong, citing Lord Devlin who said, in *Hedley Byrne v. Heller*⁽¹⁴⁾ that: "A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not". With respect, it is submitted that Professor Coote does not adequately appreciate the need to impose minimum obligations in contractual relations especially between businesses and consumers. In the above cases therefore, the legislator has quite rightly therefore deemed it improper for such exclusion clauses to have any effect as against a person contracting as a consumer.

(b) Provisions subject to the requirement of reasonableness.

S.2(2) states that "In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness".

13. Coote, Exclusion Clauses (Sweet and Maxwell, 1964).

14. [1964] A.C. 465 at 538. See also B. Coote, "Unfair Contract Terms Act 1977", 41 M.L.R. (1978), 312 at 314.

This sub-section is complementary to S.2(1) where the damage results in personal injury or death. The concept of "reasonableness" is central to the whole Act. S.3 of the Act states that:

(1) This section applies as between contracting parties where one of them deals as a consumer or on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term -

(a) when in breach of contract, exclude or restrict any liability in respect of the breach, or

(b) claim to be entitled -

(i) to render a contractual performance substantially different from that which was reasonably expected of him, or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned above in this sub-section) the contract term satisfies the requirement of reasonableness".

Section 2(2) has a very broad sphere of application. Not only does it affect physical damage to goods, but also economic loss as in *Hedley Byrne v. Heller & Partners*.⁽¹⁵⁾ This sub-section does not however create new grounds for actions in negligence. It merely makes it more difficult for liability to be excluded.

15. [1964] A.C. 465; See Lawson, Exclusion Clauses (Oyez Publishing Ltd, London, 1978), p. 85. He supposes that car parks, dry cleaners and launderers are the main targets of this section.

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Section 3, like S.2, is not confined to contracts to which one party contracts as a consumer. It suffices that where the party is not a consumer, he contracts on the terms of a standard contract. Hence even commercial contracts are within the purview of these sections. Almost any type of clause designed to exclude or limit liability or one of the party's obligations can therefore be challenged. To this extent, Professor Atiyah is right in asserting that the doctrine of breach of fundamental term or breach of fundamental obligation has become unnecessary.⁽¹⁶⁾ The target of S.3(2)(b) is the practice, particularly of tour operators for example, who, while agreeing to undertake a certain obligation, reserve at the same time the right to substitute that obligation with one entirely different.⁽¹⁷⁾ It must be stressed that the Act requires performance to be what is expected by a reasonable man. It is an objective standard. Any institution which according to S.11(2) is charged with the determination of whether an exclusion clause is reasonable or not has been given guidelines for such determination in Schedule 2 of the Act. The matters to be taken into consideration are:

- (a) the strength of the bargaining positions of the parties relative to each other; taking into account (among other things) alternative means by which the customer's requirements could have been met;

16. Atiyah, *Introduction to the Law of Contracts*, 3rd Edn, Clarendon Press, Oxford, 1981 p. 152.

17. Contrary to Prof. Coote's thesis, exclusion clauses can also take the form of a stipulation that one party does not have to perform certain obligations which are part of what he has agreed to.

- (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term.
- (c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
- (d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether, it was reasonable at the time of the contract to expect that condition would be practicable;
- (e) whether the goods were manufactured, processed or adapted to the special order of the customer".

S.11 also adds to these guidelines. S.11(1) states that regard must be had to the "circumstances which were, or ought reasonably to have been, known to or in contemplation of the parties when the contract was made". Sub-section 4 requires that where liability is limited to a particular sum of money, in order to determine its reasonableness, regard must be had to the resources the party proffering the clause could expect to have in the event that the liability arises; and also whether that party could cover himself by insurance.⁽¹⁸⁾ S.11(1) finally places the onus of proving reasonableness on the party relying on the exclusion clause. Clauses excluding liability for misrepresentation are

18. This section is designed to redeem the situation created by Harbutt's Plasticine v. Wayne Tank Pump Ltd. [1970] 1 All E.R. 461 where what was a perfectly reasonable exclusion clause between two businesses was struck down.

now subject to S.8 of the Act.⁽¹⁹⁾ They must be reasonable. So also should clauses requiring a consumer to indemnify another person whether party to a contract or not.⁽²⁰⁾

The effect of a breach of contract on exclusion clauses has been unqualifiedly stated in S.9(1): "Where for reliance upon it a contract term has to satisfy the requirement of reasonableness, it may be found to do so and given effect accordingly notwithstanding that the contract has been terminated by breach or by a party electing to treat it as repudiated". This ensures that the "doctrine of fundamental breach does not invalidate a clause which has passed the reasonableness test, as for instance in *Harbutt's Plasticine*".⁽²²⁾

Since the Unfair Contract Terms Act, a new Act, the Sale of Goods Act 1979, has been passed. This new Act does not repeal any parts of the 1977 Act.⁽²¹⁾ There appears however to be a certain inconsistency between S.6(2) of the 1977 Act and S.14(2) of the Sale of Goods Act, 1979. The latter states that: "where the seller sells goods in the course of business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition:

(a) as regards defects specifically drawn to the buyer's attention before the contract is made; or

19. This replaces S.3 of the Misrepresentation Act 1967.

20. S.4 of the Act. Such situations hardly arise however.

21. Blair, Sales of Goods Act 1979 (London, Butterworths 1980) no. 79, p. 27.

22. Harbutt's Plasticine v. Wayne Tank & Pump Co. Ltd. [1970] 1 Q.B. 447.

(b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

S.6(2) it is recalled, categorically states that as against a consumer Ss.13, 14 or 15 of the Sale of Goods Act cannot be excluded. It seems therefore that on the basis of S.6(2) of the 1977 Act a court may even refuse to hear evidence that defects were specifically brought to the knowledge of a consumer in order to validate the exclusion clause because such a clause is simply void.

An important feature of English legislation on standard form contracts which, as will be seen, remarkably distinguishes it from the French legislation or even the Swedish legislation, is that it has not altered redress and enforcement procedures, relying as it has always done on the courts. Administrative control which has been outlined by the Fair Trading Act 1973, is essentially confined to procedural unfairness and the protection is given exclusively to consumers.

SECTION II : Recent French Legislation

As was seen in Chapter Three, the French courts have managed to deal with some of the injustices of standard form contracts even without any legislation. However, they were always faced with the difficulty of providing a coherent theory enabling them to strike down or modify contracts which appeared to them to be unconscionable. Several attempts were made, notably, attempts to use the doctrines of 'lesion' and 'abuse of right' as a basis for the formulation of a general theory.

Article 1674 of the French Civil Code enables the vendor who has sold his land for less than seven-twelfths of its value, to rescind the contract. This provision has however been confined to real property

and only applies under restricted circumstances.⁽¹⁾ 'Lesion' therefore failed as a basis for a general theory. The theory of abuse of rights was also used as a basis in an attempt to formulate a theory for intervention in unfair contracts. This theory was built around Article 1382. However this was against the principle "qui dit contractuel, dit juste" of Article 1134 of the Civil Code. The theory was therefore only used to intervene in contracts whenever the principle of freedom of contract ran counter to some other basic principle. Hence, it was used essentially in contracts in restraint of trade. Abuse of rights also failed to provide a theory to enable the courts to strike down or modify unconscionable contracts.

Before the 1978 reforms, the French legislature had passed a number of laws, dealing with the various aspects of standard form contracts. One such law, Law No. 75-597 of 9th July 1975 on forfeiture and penalty clauses has already been elaborately discussed.⁽²⁾ The law of the 22nd December 1972⁽³⁾ modified by the law of 27th December 1973 (Loi Royer)⁽⁴⁾ regulated 'premium sales'. The latter law, 'loi Royer', also dealt with problems of procedural unfairness before and after the signing of a contract. The law of 22nd December 1972 also regulated door-to-door sales. Most of this legislation is designed to protect consumers (who are the primary targets of standard contracts) from unconscionable aspects of the latter.

1. Mazeaud, Leçons de Droit Civil, Tome 2 (Paris 1973, 5th Edn. by de Juglart) pp. 175-178.

2. See Section 3 of Chapter Three.

3. J.C.P. 1972, 111, 39950;

4. J.C.P. 1974, 111, 41167. This law also protects small businesses from the larger ones.

In 1978, two laws were passed: *Law No. 78-22 of 10th January, 1978*,⁽⁵⁾ dealing with the disclosure of information to, and the protection of consumers in certain credit contracts. The second in *Law No. 78-23 of 10th January, 1978* dealing with the sale of goods or services to consumers.⁽⁶⁾

The feature which sets these two pieces of legislation apart from what had hitherto been done is the fact that there is explicit recognition of the exploitation by the stronger of the weaker party to standard credit or sale contracts, and an overt desire to restore a certain equilibrium between the parties. By so doing, the French legislature flouted the bed-rock of contract theory in French law: the 'autonomy of the will' and the binding force of contracts legally made. This prompted M. Foyer a deputy, to protest against what he called the "ravage of Civil law".⁽⁷⁾

Both laws protect consumers before and after they enter into any contract. Hence, intervention can now be made a priori, not necessarily a posteriori (i.e. after a breach) as the case was before 1978.

Provisions related to procedural unconscionability: the problem of disclosure of information, being central to the whole idea of consumer protection, is dealt with by both laws. Both laws deal with this problem in two guises. In the first place, the duty to disclose

5. J.O. 11 janvier 1978, p. 299; *Receuil Dalloz Sirrey* 1978 Leg. P. 84.

6. J.O. 11 janvier 1978, 301 *Receuil Dalloz Sirrey* 1978, Leg. p. 87.

7. G. Berlioz, "Droit de la Consommation et Droit des Contracts" J.C.P. 1979, Doctrine 2954 at no. 4.

is owed to the general public. Disclosure rules of this order are aimed at the publicity and advertisements made by manufacturers and retailers, banks etc; rules which seek to ensure the accuracy of statements made to the general public. This aspect of disclosure has come under the law since 1905.⁽⁸⁾

Article 22 of Law No. 78-23 strengthens previous legislation in this connection by creating the means by which the accuracy of such statements can be tested. Article 4 of Law no. 78-22 regulates advertisements of credit transactions. This is designed to control the activities of credit-brokers who are henceforth limited in the nature and extent of baits they can throw around to entice consumers. Those who do not observe this rule may be fined between 2000 F and 5000 F. Articles 39-43 (Chapter V of the Law), also deal with such disclosure in relation to the sale of goods or services. Article 40 states that any person in breach of these provisions might be fined up to 50 per cent of the costs of the advertisement.

Besides these rules, provisions requiring disclosure of a different order - to a particular contracting party are found in both laws. While the former type of disclosure, i.e. to the general public might be said to be negative (in the sense that a party is required not to engage in certain practices), disclosure of this order is positive because it requires that party to do certain things, to provide definite information. One party - the business - is required to disclose all that is necessary to enable the other party to understand the full implications of the contract he is about to enter into:

8. Loi du 1^{er} aout 1905. See also Loi Royer, note 4, op. cit.

information on the goods or service itself and also on the terms of the contract. This is a patent affirmation by the French legislature that the adage "Let the buyer beware", for so long a fundamental part of contract theory has become ill-suited for present-day adhesion contracts. Article 7 of law no. 78-23 provides that the qualities, composition, quantity, description and even its uses and inherent risks and dangers must be disclosed.⁽⁹⁾

Disclosure extends to the terms of the contract. In this, law no. 78-22 goes very far. Not only does it require full details of the contract to be given; articles 6 and 7 go even further to prescribe the form which any credit contract will have to assume. At the pre-contractual stage, any person requiring a loan must make a written offer in the form prescribed by decree no. 78-509 of 24th March 1978 which goes as far as prescribing the type of characters with which the document should be printed. This offer remains open for fifteen days although in practice, the lender might accept it immediately, thus bridging this period.

In addition to these safeguards, the borrower benefits from a seven-day cooling-off period, during which he may withdraw his offer. However, until the expiry of that period, neither party to the contract can enforce it.

9. As in English law, such disclosure was only required in insurance contracts or contracts for the sale of immovables (See Article 7 of Law no. 261-11 of 3rd January 1967 on the sale of immovables). The business community opposed the extension of this requirement to other contracts because it would require them to divulge trade secrets. Luc Bihl, in "La loi no 73-23 du 10 Janv. 1978 sur la protection et l'information du consommateur"; J.C.P. 1978, Doctrine 2909, thinks however that such protection is only desirable in contracts where the goals involve high technology, rather than where the contract concerns consumer goods.

Article 35 of law no. 78-23 gives power to the 'Conseil d'Etat' to regulate or forbid clauses in contracts between professional and non-professional persons or consumers in accordance with the advice given to it by a commission created for the purpose of policing such contracts, to rid them of their unconscionable aspects. In pursuance of this power, a decree was passed on the 24th of March, 1978, article 1 of which invalidates clauses in adhesion contracts which do not figure on the contractual document signed by the other party, such as clauses printed on receipts, tickets. Similarly, clauses incorporated by reference are void.

The law does not however define who a consumer or a non-professional is. Law no. 78-22 in its article 3, excludes from the ambit of the present law credit contracts which are made in solemn form, those whose object is to finance professional activities, those made with incorporated bodies (as borrower), those for which the loan period does not exceed three months and those designed to finance the purchase of immovables. Furthermore the sum involved must not exceed one hundred thousand Francs. The lender must be a person or institution which habitually gives credit. Hence, a contract made with a department store which habitually gives credit to its customers is within the purview of this law.

Article 35 of law no. 78-23 mentions non-professionals and consumers. It is difficult to see the relevance of this distinction. An example of this distinction is that of a publisher who is a professional, a writer, who is a non-professional and the reader who

is a consumer. Does this therefore mean that persons such as artists, musicians, writers fall within the protection of the new law. (10)

Although the parliamentary debates prior to the passing of this law do not disclose such an intention, without such an interpretation of S.35, it is difficult to see any *raison d'être* for the distinction.

If a "consumer" is defined as the "final user of the goods or service", (11) this will unduly restrict the scope of the new laws. The veil of incorporation for example, should not preclude a small company virtually owned by one person from the protection of the legislation if such a company enters into an unconscionable contract, whether for the purchase of a good or for credit, similar to that entered into by a consumer. (12) Berlioz thinks therefore that the criterion for the applicability of the new laws ought to be whether the party had the possibility of negotiating the terms of the contract. If he did not, he should be entitled to the protection of the new legislation. This view is plausible in the light of the fact that some professional persons such as small retailers and small scale farmers might be no better placed than consumers whenever they contract for business purposes.

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10. Luc Bihl, "La Loi 110 78-23 du 10 janvier 1978 sur la protection et l'information du consommateur", J.C.P. 1978 Doctrine 2909 no. 20.
 11. Fourgeoux, Droit de la Consommation, (1978) p.c. 4.
 12. G. Berlioz "Droit de la consommation et Droit de, contrats", J.C.P. 1979, Doctrine 2954 no. 9.

Substantive Provisions:

Law no. 78-22 linked a financing contract to the contract of sale for which the credit was needed. Before 1978 the contract of sale was independent of the financing contract. Hence, if a finance company refused to lend to the borrower, the contract of sale (for which finance was needed) nevertheless went through, in the absence of a clause stipulating otherwise. Alternatively, the financing or credit contract may go through without the delivery of the goods for which the credit was required.

Article 9 of the new law states that where the offer in a credit contract mentions the purpose of the loan, the obligation of the borrower would not commence until the goods or service mentioned has been delivered or performed. In the case of a continuing performance, when the performance begins; and also, the obligations of the borrower cease or are interrupted when performance ceases or is interrupted. Paragraph 2 of article 9 states that on a breach of the primary or main contract by the seller, the credit contract automatically ceases. Other measures to protect the credit consumer have been provided besides this important innovation. Penalty and liquidated damages clauses have again come under regulation. In credit and hire-purchase agreements such clauses are designed to cover two eventualities; first of all, cases where the borrower seeks to repay the whole loan before its full term. This might deprive the lender of the sums he would have earned as interests. Usually, there is a clause in credit contracts that the full interest for the full term will be paid. Decree no. 78-375 of March 17th 1978 in its article 19 states that in such a case, the

interest payable shall not exceed 40 per cent of the sum repaid before the end of the term of the loan.

More often than not, the cases turn on penalties or liquidated damages where the borrower fails to repay the loan on time. Articles 20 and 21 of Law no. 78-22 cover such cases. The borrower may breach the contract in one or more of several ways: non-payment of instalments, parting with goods subject to hire-purchase, or breaching any other condition of the contract. Article 20 provides that on such an occurrence, the lender may immediately require repayment of the entire sum lent, plus interest already due and demand liquidated damages which have been regulated by article 2 of decree no. 78-373 of 17th March 1978. The lender may impose on the party in default by way of damages, 8 per cent of the sum due on the date of the breach. Alternatively, the lender may not require immediate repayment of the whole sum, but merely liquidated damages equivalent to 8 per cent of the unpaid instalments. This does not of course preclude him from requiring payment of the normal sums due plus "delay interests". The court may however increase or decrease the liquidated damages provided for above, on the basis of the new article 1152 of the Civil Code.

Article 21 of the above mentioned decree provides specific ceilings for liquidated damages in the case of hire-purchase contracts. These ceilings take into consideration the difference between the unpaid instalments, and the residual value of the goods on the one hand, and the purchase value of the goods (as determined by an expert) on the other hand. Any lender who imposes liquidated damages

over and above these legal limits is liable to be fined between 2000 F and 20,000 F.⁽¹³⁾

Law no. 78-23 of 10th January 1978 achieved a land-mark as far as French law goes generally, in opting for what nearly amounts to a total exclusion of judicial control of adhesion contracts. Administrative, rather than judicial control, has been provided for.⁽¹⁴⁾

Article 36 creates a commission for unconscionable clauses in contracts between professional people (businesses) and consumers or non-professional persons. The commission will be affiliated to the Ministry of Consumer Affairs. The commission is composed of fifteen members amongst whom must be a judge (from the judicial bench) who is to be the Chairman of the Commission; two other judges (from the judicial or administrative bench) or members of the 'Conseil d'Etat', three representatives from the administration; three legal advisers on the law of contract, three representatives from the consumer association; three representatives from the trade association.

Article 37 determines the function of this commission as follows: it shall examine the model forms of standard contracts to find out whether they contain any unconscionable clauses. The commission may do so at the instigation of the Ministry of Consumer Affairs or by a consumer or trade association. It may also act on its own volition. It may make public its recommendations (without specifically mentioning any names). The commission also produces a yearly report in which any

13. See Article 25 of Law no. 78-22 of 1978.

14. The initial bill provided for judicial control: See Project de loi, Ass. Nat. 3154, 1977-78; also J.D. De'b Ass.Nat. 8 dec. 1977. See also G. Berloiz, "Droit de la Consommation et Droit de Contrats", supra. note 12 at n.23.

suggestions for legislative or administrative reforms are put forward.

If the commission discovers any unconscionable clause in a standard contract, it may then consult with the "Conseil d'Etat" which may then issue a decree banning or regulating such a clause. Article 35 gives four criteria for determining whether a particular clause is unconscionable or not:

- (i) it must first of all be inserted in a contract between a professional person and a non-professional person or a consumer;
- (ii) it must be imposed by the professional person on the non-professional person or consumer;
- (iii) it must be an abuse of the professional's economic superiority;
- (iv) the clause must confer on the professional person an excessive advantage over the other person.

The first decree from the 'Conseil d'Etat' to apply the new law is Decree no. 78-464 of 24th March 1978.⁽¹⁵⁾ This decree prohibited the inclusion of two types of clauses in standard form contracts between professionals and consumers: those clauses whose object or effect is to give the professional a right to unilaterally modify the characteristics of the goods or services to be delivered; those whose effect is to exclude or limit the liability of a professional person towards the non-professional or consumer in the event of a breach by the former. Other types of clauses regulated by this decree include guarantee clauses - requiring the professional to insert a guarantee clause clearly indicating the guarantees he is legally compelled to give the consumer. Some

15. D. 1978, 228.

other recommendations have been made by the commission but they have not yet (until 1981) been translated into decrees.⁽¹⁶⁾

It is useful to note that Article 35 provides that clauses which could be considered unconscionable include clauses relating to the mode of fixing and payment of the price; the quality of goods; the rescission or renewal of the contract; guarantees, the passing of risks, the extent of liability assumed by the seller and clauses relating to the mode of performance.

The nature of these prohibitions have preoccupied some scholars.⁽¹⁷⁾ The broad characterisation of the clause as conferring "excessive advantage" on the profferor appears vague. Nowhere in law no. 78-23 is "excessive advantage" defined. Excessive in relation to what? Secondly, is the onus of proving all four criteria for the existence of unconscionability on the non-professional or consumer? Because these issues are to be decided by the commission which is composed of experts, maybe the French legislator did not find it useful to determine such matters of detail.

If the above criticisms can be easily overcome, the position is different when one considers the problem of sanctions in law no. 78-23. The law stipulates that any clause which has been adjudged unconscionable is void. In certain cases (credit contracts), a fine may be imposed. Those are however exceptional cases. Merely declaring the clauses void, it is submitted, will not deter businesses from inserting such clauses

16. Philippe Malinvaud, "La protection des consommateurs", D.1981, Chronique viii.

17. Bihl, note 10, op.cit. nos. 22-24.

into their standard forms and this practice will inevitably influence the buyers in point of fact. Merely declaring such clauses void is therefore not nearly enough if businesses are to be dissuaded from such practices.⁽¹⁸⁾

What becomes of the judiciary in relation to disputes arising from such contracts? Section V of Book 3 of the Civil Code (articles 1156-1164) give the courts the power to interpret contracts. The new legislation has not detracted from this standpoint. Judges may still declare such contracts void. They do not however have the power to declare any type of clause void, which has not been declared void by the regulatory body.

This state of affairs has been criticised, especially because the regulatory body is viewed as being part of the government. Hence the extent to which unconscionable contracts will be regulated might depend on what view the government takes and this obviously hinges on the political and ideological complexion of the government in power. Surely, a socialist government is bound to assume a more protective attitude towards consumers than a conservative government would. It is submitted that there is a case for removing the regulatory body from the control of the government.

18. Bihl, note 10 no. 24; Thanh Bourgeois ; D. 1979, Chronique III no. 24.

SECTION III : The German Law on Standard Contract Terms

A Background

The German Civil Code of 1900 did not mention standard form contracts, the problem not having been recognised then. It did not take very long however for it to emerge. In 1921 the German Supreme Court declared certain clauses in a standard form contract to be against good morals because the profferer of the clauses took advantage of a monopoly situation.⁽¹⁾ Legal scholars followed suit in examining the problems posed by standard form contracts. In an article published in 1933, Professor Grossman-Doerth pointed out that entrepreneurs did create new sets of contractual rules by means of their standard contract forms.⁽²⁾ Professor Raiser also noted that the general rules on the law of contract applicable then could not adequately deal with the emerging problems. He called upon the legislature to intervene.⁽³⁾

Unlike English and French law which initially looked at the problem from the point of view of consent, i.e. whether or not the adhering party had given his consent to the terms, inserted in the contractual document, the German Supreme Court felt that by the fact

1. RG 26 Oct. 1921, RGZ 103, cited in von Breinsein: "Le droit allemand relatif aux Conditions contractuelles générales", [1978] Gaz. du Palais, 110.

2. Cited in von Marschall: "The German Law on Standard Contract Terms" (1979) Maritime and Commercial Law Quarterly, 278 at 279.

3. Cited in von Breinsein, note 1 supra. at p.111.

of entering into the contract, such a party had thereby "submitted" himself to its terms. Conscious acquiescence was therefore not required.⁽⁴⁾ Having taken this position, the German Supreme Court however proceeded on a strict interpretation of standard contract terms and, of course, there was the overriding condition that no clause which was contrary to 'good morals' could stand.

It soon became evident however that this stance by the German Supreme Court did little by way of protecting weaker parties against unconscionable standard terms, especially in view of the fact that the stringent condition the courts required to declare a clause against 'good morals' meant that the injustice resulting from a clause had to be indeed glaring for the courts to hold that it infringed article 138 of the Civil Code.

After the second world war, the Supreme Court shifted from dealing with the problem on the basis of article 138 of the Civil Code (good morals) to article 242 - the requirement of good faith.⁽⁵⁾ Because the requirement of good faith is less strict than the requirement of good morals, the German courts did therefore acquire a wider latitude in controlling standard contracts.

In a 1955 case,⁽⁶⁾ the German Supreme Court held that although the validity of standard form contracts did not depend on the conscious consent of the adhering party, such a party being presumed to have

4. Dawson: "Unconscionable Coercion: The German Version", 89 Harvard Law Review (1976) p. 1041 at p. 1105.

5. Dawson, *op. cit.* note 4 at p. 1054.

6. Judgement of March 8, 1955, BGH, 17 BGHZ 1, cited in Dawson, p. 1108.

"submitted" himself to the contractual provisions, nevertheless, he must be presumed to have submitted himself only such terms as he could "fairly and justly reckon". The Court further held that if the language of the contractual document did not permit a fair and just interpretation by the court, any unfair provisions would be unenforceable. The case in point was brought by a shipper who sought to recover possession of goods he had shipped, against a carrier. Under the term of the standard contract, a lien for the freight was created in favour of the carrier against the consignee of the goods, not against the shipper. The court conceded that a lien could be created in assets owned by another party if the lienor believed in good faith that they were owned by his debtor. It concluded however that in a standard contract, prepared for general use by a carrier, neither consignor nor consignee had reason to foresee such an extension of their own risks. It therefore held that the clause did not apply.

A 1964 decision introduced another line of reasoning the implications of which went much deeper than any previous decision.⁽⁷⁾ The case involved a contract for services in which a broker undertook to find a willing lender of money. A clause in his standard contract form provided that his commission was earned if and when he provided a willing lender. That clause constituted a departure from a Civil Code provision which stipulated that commission is earned only when the event occurred, i.e. the actual loan is given. That provision is

7. Judgement of November 4 1964, B611 [1965-1] NJW 246.

is nevertheless 'facultative' as opposed to mandatory. Contractual parties may provide otherwise. The Supreme Court held that because the Civil Code provision was a legislative judgement, any derogation from it although possible, had to be fully understood, by the other party to the contract. The court found that this was not so in the instant case.

Between 1955 and 1974 standard contracts became one of the most widely discussed themes by German jurists. It became obvious that the problem had assumed such dimensions by the early seventies (given the sharp rise in consumer credit) that Professor Raiser's early suggestion that legislation was required had to be followed.⁽⁸⁾ Questions were raised however as to what nature the legislation should take. Should specific rules be created or was it sufficient to simply modify and add to the existing Civil Code provision?

In 1972, a work-shop attached to the German Ministry of Justice was given the task of looking through the whole question of standard form contracts and their studies culminated in law reform proposals which were eventually passed unanimously by parliament on the 24th of June 1976.

B: The Act Concerning the Regulation of the Law of Standard Contract Terms

The new law⁽⁹⁾ is divided into five parts. The first part comprises eleven articles which constitute the core of the substantive

8. Other Western European countries were also considering taking special legislation in this connection.
9. Translation by Nina Moore Gilsten, (1978) 26 American Journal of Comparative Law, p. 568.

provisions. The second part consists of only one article, article 12 which mentions the rules of private international law in this connection. The third part deals with procedures for the enforcement of the Act while the fourth and fifth parts define the sphere of application of the new Act. Because it would require too much time and space to look at all the provisions, discussion will be limited to the essential provisions of the law.

Part one of the Act covers three aspects of the law of standard contract terms: the problem of definition, the question of incorporation of terms and finally, the problem of the interpretation of standard terms.

Article 1 states as follows: "(1) Standard contract terms are all those contractual provisions drawn up for a large number of contracts which one contracting party (the proponent) presents to the other contracting party for his assent. It makes no difference whether the stipulations are contained in a separate instrument or included in the contract itself, what their scope may be, what type of writing is used, or what the form of the contract may be. (2) Standard contract terms are not involved when and insofar as the contractual conditions are individually negotiated between the parties".

Three distinguishing criteria can be distilled from the very broad definition given above: such a term must be drawn up in advance; it must not be drawn up solely with respect to a particular transaction but rather to be applied to a number of transactions. Finally, it must be imposed by one party - the proponent - on the other.

With the exception of a few articles, the law is not confined to consumer dealings; rather, it is applicable whenever a standard contract is used.⁽¹⁰⁾ The above definition is indeed broad since it encompasses a wide gamut of terms: terms written on the contractual document proper, i.e. terms appearing above the signature; terms which appear at the back of any contractual document, to which reference is usually made on the front page; terms inserted in documents evidencing a contract such as receipts or tickets; clauses which are simply incorporated by reference.

Paragraph 2 of article 1, excluding from the sphere of application of the Act any term individually negotiated is however bound to be problematic as one commentator has already pointed out.⁽¹¹⁾ It is not clear whether a term would be deemed to have been individually negotiated merely by dint of the fact that the proponent of the term is ready to change the term, irrespective of whether the term is changed or not, or whether an actual change has to come about. In a Supreme Court decision on this point which was taken before the coming to force of the Act, it was held that the mere readiness to change the term is sufficient to transform a standard term into one individually negotiated.⁽¹²⁾ Such a view surely will enhance the possibilities of unscrupulous businessmen evading the new law and might also lead to time wasting in haggling over terms, the very thing standard contracts are designed to check.

10. This can be compared with the English Unfair Contract Terms Act and contrasted with the French and some Swedish legislation which are confined to consumer contracts.

11. Otto Sandrock, "The Standard Terms Act 1976 of West Germany", [1978] vol 21 American Journal of Comparative Law at p.557.

12. 30 NJW 624-626 [1977] cited in Sandrock, supra, p.557.

Having defined a standard contract term, the Act goes on to deal with the problem of incorporation of terms into contracts. The Act does not depart very much from the position taken by the Supreme Court in this regard. Article 2 states: "(1) Standard contract terms become a component part of the contract only if the proponent upon the making

(1) expressly brings them to the attention of the other party or, if this would be unduly difficult under the circumstances, he does so by a clear visible notice posted at the place of making of the contract, and

(2) if the other party has had a reasonable chance to obtain knowledge of their content,

and if the other contracting party agrees to their application".

"(2) The contracting parties may agree in advance to the application to a specific type of legal transaction of specific standard contract terms, upon compliance with the requirements mentioned in paragraph 1 above".

The above rules are simply a rendering of the judicial view into legislative form. As in English law, the German courts required notice to be given to the other party by the proponent of contract terms. It is noteworthy that Article 2 does not address itself to the question of the time the notice is to be given; an important enough question. It is also remarkable that in addition to the requirement of notice, the new rules lay down that the other party has to agree to the application of the term. Article 24, paragraph 1 however states that the rules enshrined in article 2 cannot be invoked by a merchant for his own protection. The article is

exclusively for the protection of consumers. How that provision can be implemented in the innumerable daily consumer transactions appears inconceivable except it is acknowledged that such consent is to be implied. In that event, the provision appears otiose. The article is nonetheless important and welcome in certain consumer contracts of relative importance such as the sale of cars, refrigerators etc., and in important service contracts.

The protection afforded to consumers by article 2 goes only some way. A consumer may be given notice of a contractual term and may even understand and accept it in spite of the fact that it is unconscionable because he either does not fully appreciate its implications or because he has no alternative but to accept the term. Article 3 however affords some relief. It states as follows: "Stipulations in standard contract terms which, according to the circumstances, particularly according to the external appearance of the contract, are so unusual that the contracting parties of the proponent need not anticipate them, do not become an integral part of the contract". Professor von Marschall^(12a) in order to illustrate this article, gives an example of a contract entered into for the retail sale of a refrigerator in Bonn with a clause that the buyer agrees to accept delivery in Hamburg. Such a clause is so unusual that it is ipso facto invalid, irrespective of notice or consent.

Having determined when contractual terms are deemed incorporated in a contract, articles 4 and 5 of the Act provide for their interpretation. Article 4 stipulates that individually agreed upon terms

12a. Von Marschall, note 2 supra. at p.282.

take precedence over standard terms. Because the "parole evidence rule" is unknown to German law, orally negotiated terms would therefore also take precedence over written standard terms. Article 5 which states that in the case of any doubt a clause is to be construed against its proponent merely restates the judicial principle of construction also known in English law - the "contra proferentem" rule. Article 6 is intended to modify the provision of article 139 of the German Civil Code which prescribes that where part of a contract is declared void, the whole contract becomes void also if it cannot be assumed that the parties would nevertheless have entered into the contract without the invalidated part. Article 6 provides therefore that unless performance after modification of the contract would subject one of the parties to undue hardship part of a contract may be invalidated while the rest of the contract stands.

Articles 9 through 11 constitute the core of the new legislation as they contain provisions which regulate the content of standard contract terms. Article 9 states: "(1) Stipulations in standard contract terms are invalid if the contracting partner prejudices unreasonably the command of good faith. (2) In case of doubt, an unreasonable prejudice is presumed if a stipulation (1) cannot be reconciled with the fundamental idea underlying the legal rule from which it deviates, or
"(2) so limits essential rights or duties inherent in the nature of the contract that attainment of the purpose of the contract is jeopardized". The above provision is similar to the requirement of reasonableness in the English Unfair Contract Terms Act 1977.

It reformulates the provisions enshrined in Article 138 and 242 of the German Civil Code which command good morals and good faith in contracts. Both the presumptions of paragraph 2 of article 9 are derived from German case law. The first presumption denies contracting parties the right to deviate fundamentally from any dispositive legislative rule. Any term which stipulates otherwise will be deemed to impose an unreasonable prejudice on one party. The second presumption is comparable to the English law doctrine of fundamental obligation. It assumes that every contract 'type' has inherent rights and duties. Any clause, the aim of which is to divest a contract of all such rights and duties will be presumed to be unreasonably prejudicial to one of the parties.

In addition to these general provisions of article 9, articles 10 and 11 proscribe about forty types of clauses. These clauses are among those which are recurrent in standard forms and which have generally been invalidated by the German courts. The clauses listed in article 10 are not invalid *per se* but must be evaluated within the context of the whole contract and in accordance with criteria defined by the law in ascertaining whether or not they are unconscionable. They include clauses concerning time-limits for acceptance and performance; rights of withdrawal, provisions for modification, settlements of contracts and choice of law.

The clauses enumerated in article 11 on the other hand are void *per se*. They include terms imposing short-term price increases; the right to refuse performance; prohibition of set-offs; deductions of lump-sum as indemnity; limitation of liability for gross negligence; withholding correction of a defect; limitation of the right to repair a good with hidden defects; limitation of the period of warranty below the statutory period.

Article 24 limits the application of articles 10 and 11 to consumer contracts. They may however apply when the weaker party is a small businessman such as a small shopkeeper or farmer when such party does not qualify as a merchant under the German Commercial Code.

Since as already pointed out, the German courts had already evolved most of the rules which have been enacted in the new legislation; the question may be posed as to what novel contribution the Act has brought to deal with standard form contracts. First of all, because of the inadequate publicity attached to judicial decisions, especially with respect to those of the first instance courts where such decisions abound, their effect has been rather meagre, limited to the parties involved and to members of the profession. By giving these decisions legislative form the wider publicity legislation carries will enable them to reach the consciousness of a greater part of the consumer population whose protection is particularly sought.

Secondly, the new law has introduced new enforcement procedure, contained in the third part of the Act. The German legislators opted for judicial instead of administrative control.⁽¹⁴⁾ Article 13 stipulates as follows:

"(1) One who applies or recommends the application to legal transactions of stipulations in standard contract terms which are invalid under article 9 through 11 of this Act may have a claim for discontinuance or retraction brought against him".

14. Many methods of enforcement were discussed, including administrative enforcement. The German legislators did not however desire to be seen to intervene vigorously in the 'market'; rather, their intention was to set things right for the consumer so that he may enter into contracts no longer from the very weak position from which he had previously contracted.

"(2) Claims for discontinuance and for retraction may validly be brought only

"(1) by associations with legal capacity whose statutory duty is to protect the interests of the consumer by giving information and advice. If these associations have as members other associations active in this sphere, or at least seventy-five natural persons;

"(2) by associations with legal capacity to advance commercial interests or (3) by chambers of industry and commerce or chambers of artisans".

The above provisions were partly drawn from the 1971 Swedish legislation which created a consumer ombudsman to intervene in favour of consumers. Furthermore, article 20 requires the Federal Antitrust Office to register complaints made to the courts and also to record the judgements of the courts in this connection. The effect of any judgement against a merchant is not limited to the consumer who brought the action, but extends to the benefit all other consumers who dealt with the merchant on similar terms. A form of "class action" hitherto unknown to German law was thereby introduced.

Section IV : Standard Contract Laws in Sweden

A: Background:

The widespread movement across North America and Western Europe to control unconscionable standard terms of contract which began in the late sixties into the seventies has had a forceful impact in the Scandinavian countries generally and in Sweden in particular.⁽¹⁾

1. The discussion of standard form contracts began earnestly in Sweden in 1960 - Jorgensen, 10 Scandinavian Studies in Law (1966) pp.9711.

Legislation on the law of contracts began in Sweden in 1905 with the passing of the Sale of Goods Act, 1905⁽²⁾ and the Contracts Act,⁽³⁾ 1915. The influence of the principle of freedom of contract on these pieces of legislation is evidenced by the fact that the first article in both acts stipulated that all the rules of the Acts were 'facultative' as opposed to being mandatory. It therefore meant that the extremely limited protective measures the Acts contained which were essentially with respect to matters such as misrepresentation, deceit and duress could in any event be frustrated by the use of standard terms.⁽⁴⁾

As far as judicial practice was concerned, Swedish courts were much more timorous than their other civil law counterparts such as the French and German courts in setting aside unfair contract terms outright although some covert tools such as strict construction were often used.

In certain areas, special legislation was enacted. Unfortunately, these statutes demanded a very high degree of unfairness to be present before protection could be given. An example is the Conditional Sales Act, 1915 and the Insurance Contract Act 1927. Section 2 of the former contains an important provision in connection with hire purchase contracts. It stated that: "If the buyer is in arrears with one or more instalments or any other sum due under the contract, the seller shall not be entitled to reclaim the goods on that account or demand payment for any instalment not yet due, or enforce

2. S.F.S. 1905; 38

3. S.F.S. 1915; 218

4. Sheldon, "Consumer Protection and Standard Contracts: The Swedish Experiment in Administrative Control". The American Journal of Comparative Law. vol. 22 [1974] p.19.

any other penalty provided for in the contract..."⁽⁵⁾

Generally, Swedish judicial practice was characterized by a lack of interest in the problems posed by standardized contracts. The problem of incorporation of terms into contracts was considered by the courts but their attitude was remarkably less stringent than that of English Courts, to say nothing about the French Courts. In Swedish case law, the terms must be part and parcel of each individual contract, although there is a possibility of a clause being incorporated on the strength of its widespread usage in a particular industry. With that exception, Swedish court required notice to be given of any term. This requirement was however not strict inasmuch as notice could be given through catalogues, brochures, circulars, notices and displays, among other means.⁽⁶⁾ It has even been argued that terms should be deemed incorporated into contracts on the basis of usual course of conduct not merely as between businessmen but also in consumer contracts. The argument is that because most consumers are aware that businessmen deal mainly on the basis of standardized contracts, and given that it is relatively easy for consumers to acquaint themselves with standard terms, such terms ought to apply irrespective of notice.⁽⁷⁾ Viewed in relation to other judicial approaches such as the French or German, it is manifest therefore that the Swedish judicial stance was not nearly enough to protect consumers.

5. English translation from UNIDROIT, Unification of Laws Yearbook 1961 [1962].

6. Ulf Berntiz, "Consumer Protection and Standard Contracts", [1973] Scandinavian Studies in Law, p.22.

7. Lando: 10 Sc. Studies in Law [1966] p. 130.

Although none of the pre-1970 Swedish legislation on contracts gave any guidelines with regard to the construction of contract terms, the Swedish courts did evolve certain canons of construction, prominent among which was the *contra proferentem* rule known in Swedish legal literature as the 'obscurity rule'⁽⁸⁾ The test of reasonableness also has a considerable role to play in the interpretation of contracts. The court applies the above rules of interpretation in order to ensure that the contract is fair.

The upshot of the approach of the Swedish courts was to impose vague and uncertain standards, the only advantage of which (if it could properly be called an advantage), was to instill caution in certain firms as to what terms they should insert in their standard contract forms. Viewed from a perspective of consumer protection it was obvious that the pre-1970 Swedish legislative and judicial approach to standard contract terms was a failure. This fact did not go unnoticed by the business community who, conscious of the need to maintain the public good will they had, set up business practice councils. In 1957, the Swedish Council on business practices was formed. The Public Complaints Board is an issue of this council. The latter was established by the State Consumer Council, a consumer protection agency for the purpose of resolving disputes between consumers and merchants concerning the qualities of goods and services. It began its activities on January 1st, 1968.⁽⁹⁾ The

8. Ulf Bernitz, *op.cit.* note (6) p.30. He cites a case of 1950, N.J.A 86, where the court ruled that the consequences of obscurity in an order form used by a car dealer should fall on the drafting party. Another decision- 1957 NJA 426, held that an exemption clause did not apply where damage done to a car parked in the defendant's garage was due to the garage watchman who, in the course of his employment, used the car in question for a purpose inconsistent with the contract.

9. See generally Eisenstein: "Public Complaints Board in Sweden", in *Access to Justice* eds. M. Cappelletti and M. Weisner vol. 11, Book 2 (Sijhoff 1979), pp. 493-593.

Board, which is supported by the Swedish government was designed to be an alternative to the regular courts in consumer disputes. Because its procedure is exceedingly informal, it has the advantage of being less time consuming than the regular courts. What is more, its services are provided gratuitously. The procedure at the meeting is entirely written; parties must present their claims and defences by written pleadings and they do not appear before the board.

The Board consists of five divisions, each headed by a Chairman who must be a judge and several members representing consumers and trade unions, industry and commerce. The main drawback of the Board is that it does not possess the status of a court and therefore its decisions are only recommendations compliance with which is strictly voluntary.⁽¹⁰⁾ In spite of this drawback, the Public Complaints Board remains a vital institution as the data it has compiled over the years constitute a strong indication of the problem areas thus providing an important basis for the ongoing development of consumer protection policies in Sweden.

B. Post-1970 Legislation

As the problem of standard contracts and consumer protection became more and more of a political issue, the Swedish government had to act. The first concrete result of this action was the passing of the:

10. Sheldon, *supra*. note 4, p.22. There are however certain consequences of non-compliance with the boards recommendations and these include placing the merchant's name on the National Swedish Board for Consumer Policies (NSBCP) 'black-list'. The black-list, compiled approximately twice a year, contains names and addresses of merchants who have not complied with the PCB's recommendations. These are published in the NSBCPs periodical called "Advice and Results".

Marketing Practices Act, 1970 (SFS 1970:40)

This Act, subsequently revised in 1975, was not designed to deal directly with standardized contracts. It did not purport to redress the imbalance inherent in most standard contracts. Its main thrust was to protect the consumer public from misleading advertising practices by merchants. This objective has however produced important effects on one aspect of the problem of standard contracts, i.e. the problem of procedural unconscionability. The upshot of the Act has been to impose strict disclosure rules on merchants. Article 2 of the revised Act prohibits marketing practices which adversely affect consumers or other businessmen. Article 3, which was not in the original 1970 version of the Act, requires businessmen to supply consumers with information which is important in connection with any contract they are about to enter. The article states that: "Any tradesman who, in the marketing of any goods, services or other commodity, omits to deliver information of particular significance to consumers, may be enjoined by the market court to give such information. An injunction may also be issued to an employee of a tradesman and to any other person acting on behalf of a tradesman"⁽¹¹⁾. Such information includes among others the terms of the contract; the mode of payment of the contract price; the nature of the warranties given; where required, the person responsible for servicing commitments. Further special disclosure rules have been enacted in the 1977 *Consumer Credit Act*. Article 5 of this Act provides that the 'effective interest rate', i.e., the sum total

11. Translation by Ulf Bernitz: "The Swedish Marketing Practices Act in Law and the Weaker Party vol. 1 - The Swedish Experience" Ed. Alan Neal, (Abingdon, 1981), p.120.

of all interests, surcharges and other credit costs, has to be expressly made known to the consumer as well as included in the marketing of the scheme. This 'effective interest rate' has to be expressed as a percentage of the amount borrowed. Article 6 of the law provides that such information must be given to the individual consumer before the transaction is completed.

Article 2 of the Marketing Act is designed to deal with the problem of misrepresentation by imposing a requirement of truthfulness. What is remarkable about this article is the fact that it places the burden of proving the truthfulness of any statement on the seller. This obviously enhances procedural fairness in standard contracts.

In 1971, as a complement to the Market Practices Acts the *Act to Prohibit Improper Contract Terms* was passed.⁽¹²⁾ This Act has been described as the "most important weapon in Sweden for combatting unfair contract terms"⁽¹³⁾. The most important part of the Act is its section 1 which states that: "If an entrepreneur, when offering a commodity or a service to a consumer for personal use, applies a term which, in regard to the payment and other circumstances, is to be considered as improper towards the consumer, the Market Court may, if the public interest so requires, issue an injunction prohibiting the entrepreneur from using that term or a term substantially the same in similar cases in the future. The

12. SFS 1971: 112, hereinafter called the "Contract Terms Act".

13. Hellner, "Unfair Contract Terms", in Law and the Weaker Party, supra. note 11, p. 89.

injunction shall be issued under penalty of a fine unless, for special reasons this is unnecessary". The 1971 Act limited the scope of this section to contracts involving movables and services only. This provision was extended in 1977 and it now applies also to contracts involving other objects such as immovables. The Act is confined to contractual relationships between entrepreneurs and consumers,⁽¹⁴⁾ but it is not limited to standard form contracts. It may apply to any other type of contract provided that the circumstances are important enough to invoke the public interest. In practice, however, only widely used standard contracts are bound to have this effect. Like the Market Practices Act, the Contract Terms Act cannot be invoked by an individual consumer to obtain redress against an entrepreneur. Its goal is the collective protection of consumers. The procedures for the enforcement of these acts have no room for individual vindication of rights by consumers.

While these Acts cannot by any means be considered revolutionary in terms of their efforts to protect consumers from unconscionable standard terms, their mode of enforcement is certainly radically different from the traditional methods of enforcing similar legislation in other countries. *The Market Court Act, 1970* (SFS 1970:417) which is linked to and was passed concurrently with the Market Practices Act created two institutions: the Market Court and the Consumer Ombudsman (hereinafter called the KO). The effective control of

14. In Swedish Law, an entrepreneur is defined very broadly as any "natural or legal person who professionally carries an activity of an economic nature while a consumer is one who acquires goods or services for final consumption: Sheldon, supra, note 4 at p.34.

standard contract terms turns on both these institutions.

The Market Court is a special court created to supervise the operation of both the Market Practices Act and the Act Prohibiting Improper Contract Terms. It is composed of nine members consisting of a Chairman who must be a highly qualified judge; a Vice-Chairman, also a judge; a specialist in consumer affairs (in practice, an Economics professor). The other six members represent, in equal numbers, national associations of consumers and employers on the one hand and associations of entrepreneurs on the other. It possesses the power to subpoena parties and witnesses on pain of a fine. The Market Court is a court of first and final instance, from which there can be no appeal. The obvious reason for this was the desire to prevent the prolongation of disputes. A case may nevertheless be reconsidered if "changed circumstances or other special reasons provide cause".⁽¹⁵⁾

The only property authorised plaintiff in the Market Court is the *Consumer Ombudsman (KO)*. The only exception to this rule is given in S.5 of the Contract Terms Act which provides that an association of consumers, employees or entrepreneurs may bring an application for an injunction before the Market Court where the KO decides against bringing one. This is a safeguard against any possible arbitrariness by the KO in refusing to bring an action. The KO, who must be a lawyer, used to be independent of the Consumer Board, but in 1976, both institutions were merged with the KO being

15. Sheldon, *supra*. note 4 at p. 43.

at the head. The KO acts on complaints from the public or other sources. In this connection, the records of the Public Complaints Board are very important to him. With the exception of complaints relating to the Market Practices Act, of which the KO receives about five thousand annually,⁽¹⁶⁾ he does not receive very many complaints with respect to breaches of the Contract Terms Act. Hence, he acts more on his own initiative. The KO has a tripartite role: as investigator, negotiator and prosecutor. He proceeds by examining standard contract forms which are within the ambit of the Contract Terms Act. Where he finds any improper term, unless the matter is of some weight but not very important, he may issue "a cease and desist order". If complied with, the order has the force of an injunction issued by the Market Court. If on the other hand the business refuses to comply with the order, the KO then instigates proceedings against it in the Market Court. If the latter finds that the term in question violates the Contract Terms Act or the Market Practices Act, it issues an injunction restraining the business from any further use of that clause. S.5 provides for the possibility of issuing an interim injunction. Just as in any other case where an interim injunction is sought, there must be a strong probability that the court would ultimately find in favour of the plaintiff.

Because the Contract Terms Act does not specifically state the criteria for holding a term improper, a lot is left to the discretion of the KO as far as the initial control of unfair contract terms is concerned. However the bill presented to the Swedish Parliament

16. Bernitz, Swedish Marketing Practices Act, in Law and the Weaker Party, note 11, supra. at p.109.

stated that: "A contract term may be considered improper to consumers if, in deviating from non-mandatory law, it gives entrepreneurs an advantage or deprives consumers of a right and thereby causes such one-sided relations in the parties" rights and obligations under the contract that a reasonable balance between the parties no longer exists".⁽¹⁷⁾ The KO therefore has to take into account all the pre-1970 mandatory legislation such as the Contracts Act 1915 and the Sale of Goods Act, 1905, as well as the post-1970 legislation. Since the Act does not specifically require a particular degree of impropriety or unfairness, it therefore gives a very wide latitude to the KO in determining whether a standard contract term is unconscionable or not. Thus, not only must he take such matters as warranties, exclusion clauses into account, but also the price of the goods.

In 1971, the Ministry of Justice issued a list of certain contract terms which are so one-sided that they are considered improper without reservation. Among these are the following:

- (a) Terms by which a purchaser is unilaterally bound to an order without a cancellation right while the seller reserves for himself an unlimited approval period;
- (b) Terms containing the clause "in existing condition" for the sale of factory-new goods.
- (c) Warranties which give the purchaser no right to rescind a purchase because of defects in goods;
- (d) "Force majeure" terms giving the seller the right to postpone indefinitely the full performance of his obligations.

17. Sheldon, note 4. supra. at p.35: The bill was later amended.

(e) Terms enabling the seller to unilaterally increase the contract price because of circumstances within or outside his control.⁽¹⁸⁾

The other role of the KO which is equally important to consumers, is not more than the bringing of actions in the Market Court in the long term, is that of negotiating with entrepreneurs on behalf of consumers in order that standard contracts should be fair. It has been pointed out that some enterprises welcome such negotiations because it often happens that they might be using unfair contract terms not out of a positive desire to take undue advantage of consumers, but rather, out of ignorance or tradition.⁽¹⁹⁾ Although the Swedish legislators had intended this role for the KO, the Act itself does not give expression to this intent. In 1973, however, the KO was given the power to fine firms which refused to co-operate with him in connection with any information he requires. Such refusals are now punishable by a fine of up to five thousand Swedish Kronors (about five hundred pounds). The KO has several major successes in this area, leading to a number of negotiated settlements. In 1972 for example, the KO reached an agreement with travel organisations on general terms for charter and group trips which brought about improved deals for consumers.

The Market Court imposes a contingent fine of up to one hundred thousand Swedish Kronors when it issues an injunction. If the injunction is not complied with, the fine may be enforced by regular court. The regular court, in enforcing the fine, makes a

18. Sheldon, supra. at p.38.

19. Sheldon, supra. at p.41.

determination as to the legality of the injunction, i.e. whether the Market Court acted within its proper jurisdiction. This procedure constitutes a check on any possible arbitrariness of the Market Court which is particularly welcome in view of the fact that it is a court of first and final instance. This procedure is unfortunately hardly ever invoked since manufacturers or traders are unwilling to run the risk of paying a heavy fine merely with the aim of having a formal review of the Market Courts decision.

Evaluation of the Swedish Legislation:

Within the first two years of the coming into force of the Contract Terms Act, the KO dealt with forty-four reported cases concerning infringements of the Act.⁽²⁰⁾ Thirty of those cases were resolved through negotiated settlements. Four were terminated by the use of cease and desist orders given by the KO, while four were decided by the Market Court. Infringements against the mandatory provisions of the Home Sales Act 1971 figured prominently among the reported cases. The main provision of the Act is that where in the sale of personal property, the buyer receives the offer in any place other than the seller's or his agent's permanent place of business, the purchaser must be given a one week cooling-off period within which he may withdraw his acceptance or his offer as the case may be.

Another area where the KO has frequently intervened has been in connection with the Sale of Goods Act 1905. Although the provisions of the Act are not mandatory, the KO has taken the view that any contractual term which materially reduces the purchaser's rights under that Act is an improper term under the Contract Terms Act.

20. Sheldon, supra, note 4 pp. 44-45.

The KOs use of cease and desist orders is also worth commenting upon. Although the Act requires the KO to issue such orders only with respect to unimportant matters, the KO has been using them in cases which can hardly be said to be unimportant. They have been used in respect of widely used contracts. In Sheldon's words, "What has happened is that the KO has been satisfied to establish the initial standards of his own, and the Court has become not a source of precedent but an occasional source of legitimation of the KOs decisions".⁽²¹⁾ This puts the KO in the driving seat as it were, as far as the enforcement of the legislation afore-mentioned is concerned. Indeed, during the period 1971-1975, the Market Court heard only 141 cases while the KO dealt with 17,549 cases.⁽²²⁾ His only handicap is that he is not empowered to bring private proceedings in the regular courts of law. He has submitted a recommendation to the Ministry of Justice that he be permitted to bring 'parens patriae' suits on behalf of consumers in the regular courts.⁽²³⁾ At the moment, all he can do is to refer a consumer to the Public Complaints Branch where the consumer can obtain redress against an entrepreneur.

Since 1971, the Swedish Parliament has passed more legislation which has had profound consequences on standard form contracts. The *Consumer Sales Act 1973* stipulates "minimum rules" for the validity of a consumer sales contract. The Act addresses itself to the problem of defects in goods and exclusion clauses. S.7 of the Act defines a

21. Sheldon, p. 55.

22. Eiseinstein, op.cit. note 9 at p. 508.

23. Ulf Bernitz, note 11 op. cit. at p. 111.

"fault" in goods to include in addition to actual technical defects in the product, any misleading statement regarding the nature, quality and use of the goods, provided that such a statement can be assumed to have influenced the purchaser.

The Act states what rights and remedies are available to a consumer when he purchases a defective article. It stipulates that the right to have the goods repaired is the primary right for the consumer. If that is not possible, then the consumer has the right to reject the good and get back the price paid. It does not however give the buyer a mandatory right to damages. On the contrary, S.6 gives the seller the right to exclude liability for damages.

As a result of the very limited remedies provided by this Act, the KO sought an amendment of the Contract Terms Act 1971, in order that both he and the Market Court should not be limited also to those remedies. This amendment was introduced in 1973. Hence although a term may be proper within the Consumer Sales Act, the Market Court may nevertheless hold it improper under the Contract Terms Act. A contractual clause which violates the Consumer Sales Act is implicitly therefore improper per se under the Contract Terms Act.

Although collective protection of consumers had become effective because of the activities of the KO and the Market Court, the tale was different in connection with individual consumers. The Market Practices Act and the Contract Terms Act could not be invoked by them. The Consumer Sales Act contained very limited remedies. Finally the judicial approach already examined was clearly inadequate. The need was therefore felt to empower the regular courts to have the sort of

broad powers given to the Market Court under the Contract Terms Act. This need was fulfilled by an amendment to the Contracts Act 1915. The new article 36 (SFS 1976:185) gives the regular courts the power to set aside or modify an improper contract term, having regard to the contents of the contract, the circumstances of the formation of the contract and other subsequent events and circumstances. Paragraph 2 of the new article 36 states that special regard is to be had to the need for the protection of the weaker party in the contractual relationship. The scope of the article is not confined to consumer transactions; farmers, small shop-keepers, artisans among others may be equally protected. This amendment, coupled with the Small Claims Act of 1974 which established a special streamlined procedure for the adjudication of relatively small claims in the regular courts, made it easier for the Swedish consumer to obtain redress against entrepreneurs who insert unconscionable terms in their standard contracts.

The policy behind the Swedish post-1970 approach to the phenomenon of standard form contracts is two-fold: It does not only seek to negative unconscionability in standard contracts, it also attempts to achieve, particularly through the office of the KO, more acceptable contract terms, thus encouraging more harmonious contractual relationships.

Section V : CONCLUSION

The dissatisfaction with the traditional judicial means of dealing with the problems of standardized contracts has been pervasive

throughout North America and Western Europe.⁽¹⁾

From a comparative law perspective, there is a lot in common among the legislation of the four legal systems just examined. This common ground is noticeable as far as substantive provisions go. The case is different however, with respect to the procedural methods of enforcement where each system has its own procedure.

As far as substantive provisions go, all the various systems have sought in varying degrees to protect consumers particularly against procedural and substantive unconscionability. The German legislation's target covers standard contract terms generally, while that of France is confined to consumer transactions. The English legislation is designed to control unfair contracts. In practice however the contracts which in all probability will be controlled are consumer contracts as they are those which are most likely to be standardized and unfair. Most systems have more or less used the traditional legislative method of imposing minimum general standards for contract terms coupled with mandatory provisions which have black-listed terms considered unconscionable *per se*. The German legislation utilises this method very thoroughly. In addition to the general provision of article 9, articles 10 and 11 give an exhaustive list of about forty typically unconscionable clauses.

Of all the legislation looked at, the English Unfair Contract Terms Act is the narrowest in scope as it is almost entirely concerned with the problem of exclusion clauses. This can be contrasted with the

1. Section 2-302 of the Uniform Commercial Code of the United States, states that an unconscionable contract or clause may be modified or cancelled.

Swedish legislation which seeks to regulate every aspect of standard contracts.

In nearly every country, special legislation has been enacted to deal with the problem of procedural unconscionability: the Fair Trading Act 1973 of England (this Act however deals more with antitrust issues than with issues of procedural unconscionability). The Law no. 78-22 of the 10th of January 1978 of France and the Marketing Act, 1970 of Sweden.

The enforcement procedures of the different legal systems differ considerably.⁽²⁾ The English Unfair Contract Terms Act opted for the traditional "abstract control" i.e., enforcement by the ordinary litigation process. However, the Fair Trading Act, 1973, which created the Office of the Director of Fair Trading has complemented this abstract control with a 'voluntary control system'.⁽³⁾ The Director uses his office to negotiate codes of practice with trade associations for the regulation of standard form contracts, (most codes of practice have however, been with respect to restrictive trade practices). The codes of practices only apply to members of the trade association promoting them and even then, only to those members who agree to be bound by the standards they set.

The German mode of enforcement is an improvement of the 'abstract' judicial enforcement coupled with ideas drawn from the Swedish legislation,⁽⁴⁾ Article 13 of the Standard Terms Act 1976 provides that

2. Hondius: "Unfair Contract Terms: New Control Systems" (1978) 26 Am. J. of Comp. Law, 525.
3. The first country to adopt a voluntary control system was Israel. S.2 of the Standard Contract Law of 1964 made it possible for anyone to submit standard contract terms to the Board of Restrictive Trade Practices for approval. This system is however generally acknowledged as a failure: Hondius, *supra*, p. 532.
4. Sandrock: "Germany's Standard Terms Act 1976," 1978, 26 Am. J. of Comp. Law. p.555.

"claims for discontinuance and retraction" of clauses which have been declared invalid under articles 9 to 11 may be brought by a limited number of institutions. They include consumer associations, trade unions, chambers of industry, commerce and artisans, as well as by any association with a statutory duty to advance commercial interests. Hence collective protection of consumers is also provided for.

At the extreme opposite spectrum of these enforcement procedures may be located the French model which has denied the regular courts any priority in enforcement. It provides for a "one layer control system".⁽⁵⁾ Article 36 of Law no. 78-22 creates a commission for abusive clauses whose task is to recommend the prohibition of any unfair contract term to the Council of State which may then issue a decree prohibiting the said clause. No regular court may pronounce a clause invalid which has not been invalidated by a decree from the Council of State.

The Swedish control system is multi-faceted and presents very interesting procedures. It provides primarily for administrative enforcement. The KO is in charge of this administrative control. At a second layer of control, there is a special court which possesses the necessary expertise in consumer affairs which as it were, supervises the administrative control of the KO. The KO does not possess actual decision making powers and must submit disputes to the Market Court. These controls are supplemented by the regular courts which have wide

5. Hondius, supra, p. 542.

powers under the revised article 36 of the Contracts Act. All these methods make for a very effective control mechanism of standard form contracts and deal quite adequately with the problem of access to courts often faced by consumers. In addition, the Public Complaints Board with its inexpensive, swift procedures provides a considerable leverage in the defence of weaker parties in standard contracts.

CHAPTER SEVEN.

A TENTATIVE SOLUTION TO THE PROBLEMS OF STANDARDIZED CONTRACTS
IN CAMEROON

In Chapter Four, after an examination of Cameroonian cases on standardized contracts, the conclusion arrived at was that the Cameroonian judicial attitude towards such contracts, like that of many other African states, is characterized by an inadequate analysis of the problem and that it was impossible to discern any clear principle upon which the courts acted. There was very little inclination on the part of the courts to hold such contracts invalid for unreasonableness. Nor did they follow the methods utilised by their progenitors - English and French courts - in invalidating unreasonable exclusion clauses, as examined in Chapter Three. This chapter therefore sets out to do two things. First of all, it seeks to explicate the reason for this monumental failure by the Cameroonian courts; secondly, it seeks to demonstrate that the courts are in any event ill-suited to deal with the problem of unconscionability in standardized contracts as demonstrated in the chapter on unconscionability. It concludes that what is required is legislation to tackle this problem and that administrative, rather than judicial institutions, should have the primary task of enforcing such legislation.

Section I: Reasons for the failure of the Courts:

A: Inadequacy of Legislation:

It is impossible to put one's finger on one single cause of the failure of the courts in handling the problems of standardized contracts.

The most obvious, however, turns on the laws Cameroon inherited from its colonial powers. English law of contract, like the law of obligations in France was built around the classical concept of freedom of contract.⁽¹⁾ It has already been seen that this classical paradigm of contract could not easily accommodate standardized contract, either in England or in France; hence the increased tendency to provide suitable legislation in these countries.

In the part of Cameroon which used to be under British colonial rule, the law of contract applicable, as earlier mentioned, was and still is limited to the common law, doctrines of equity and statutes of general application which were in force in England before 1900. In francophonic Cameroon, the French Civil Code governed the law of contracts. Even after acceding to independence, Cameroon, like many other African States made no efforts to modify the law of contract in order to accommodate local factors. Seidman points out that save for constitutional provisions, the courts in anglophonic Africa were still empowered to defer to English precedents.⁽²⁾ The same is true of the French speaking African States, a few amongst whom have only recently begun to introduce their own Civil Codes.⁽³⁾

1. See Chapter One generally.
2. See Seidman, R.B.: The State, Law and Development. (London 1978), p.37.
3. See Lampué, P.: "L'Influence du droit français et du droit coutumier sur les lois civiles africaines," in "Dynamiques et finalités des Droits Africains" (Paris 1980) ed. Conac G. p. 14.
Senegal enacted a Code of Civil and Commercial Obligations in 1976, drawn nearly entirely from the law applicable in France. See Tossi, J.P., Le droit des Obligations au Senegal, (L.D.G.J., Paris, 1981). The Civil Code of Ivory Coast enacted in 1970 does not deal with the law of contract. The most recent code is that of the Seychelles. The latter is interesting inasmuch as it deals expressly with standardized contracts. See Chloros, A.G.: "Codification in a Mixed Jurisdiction" European Studies in Law, Vol. 3. (North Holland Publishing Company, 1977).

Considering the fact that the law of contract is of cardinal importance in the economic development of any country, it is not easy to explain the nearly complete inattention paid by the Cameroonian legislature to this area of the law. To be sure, certain standardized contracts which are of conspicuous importance, viz., employment and insurance contracts have been provided for.

There are three basic reasons that explain the failure of the Cameroonian legislature to pass any laws dealing with contracts. The first and undoubtedly the most important reason lies in the fact already alluded to, that the independent state of Cameroon inherited a complex and fragmented legal system from its erstwhile colonial powers. It was therefore not constructive to provide any unitary legislation on civil matters for the whole country while the legal system and the civil procedure applicable by the courts differed from one region to another. The application of such legislation could hardly have been uniform. It is only as recently as 1972, as mentioned in Chapter One, that a uniform legal system was established for the entire country. Up until now, different systems of civil procedure are applicable in the country.

While the above difficulties made it impossible for the then Federal Legislative Assembly to pass legislation covering the whole country, the legislatures of the federated states could not act independently because article 6 of the Constitution of the Federal Republic of Cameroon reserved to the federal legislature the power to legislate on civil and commercial matters.⁽⁴⁾ Hence, in spite of the fact the legislatures of the federated

4. See Kontchou-Kouomeghi, A.: "Idéologie et Institutions Politiques: L'Impact de l'Idée de l'Unité Nationale Sur Les Institutions Publiques de l'Etat Camerounais" in Dynamiques et finalités des droits Africains, note (3), supra, at p. 451.

states were eager to meet the increasing need for legislation in this area, they were precluded from doing so by the constitution.

Finally, because of the political disorders that existed in Cameroon at the time of independence and even after,⁽⁵⁾ the Cameroonian legislature, conscious of the need to establish law and order, concerned itself more with criminal legislation, than with civil law legislation, an attitude which it has yet to discard.

Even if the above problems are taken into consideration, it may nevertheless be said with a reasonable degree of certainty that Cameroon is among the most backward African countries in terms of the introduction of innovative legislation on the law of contract.⁽⁶⁾ The insufficiency of contract law legislation does not however explain why the courts have been reluctant to appreciate the economic import of standardized contracts and in dealing with them accordingly. They have not followed in the footsteps of the French and English Courts which, as seen in Chapter Three, in spite of the lack of specific legislation dealing with standardized contracts, did, nonetheless, via judicial interpretation, give considerable protection to the weaker parties to standardized contracts.

It was made clear in Section I of Chapter Four that one of the obstacles in the way of a thorough appreciation of standardized contracts in Cameroon is that fact that in spite of the fact that these contracts are often most unconscionable, there is a dearth of litigation involving such contracts. This lack of litigation reduces the visibility of the

5. See Joseph, R.A.: Radical Nationalism in Cameroon: Social Origins of the U.P.C. Rebellion. (Oxford, Clarendon Press, 1977.)

6. Cameroonian legislation dealing with price control will be examined in Section II.

problems involved in standardized contracts, and hence, from the point of view of the courts, their acuteness. Two factors explain this. First of all most Cameroonians are ignorant about the law and their rights in connection with such contracts, and secondly, there is the problem of "access" to the courts.

B: The Problem of 'Rights Consciousness'

That most people who enter into standardized contracts are unaware of their rights and ignorant of the law is not a problem peculiar to Cameroon. A researcher on consumer protection in Nigeria finds that "for most people the real problems about consumer protection are ignorance and a lack of faith in the machinery for effecting protection."⁽⁷⁾ Obviously, illiteracy counts for a great deal for this ignorance. It is not, however, the sole reason, for this ignorance is also a feature of the jurisdictions of the developed countries where illiteracy is very much less common. Professor Furmston points⁽⁸⁾ out that an unusual feature of the cases dealing with the hire-purchase of defective motor vehicles such as *Karsales (Harrow) Ltd. v. Wallis*,⁽⁹⁾ is the fact that it is the finance company, which usually breaks the contract that appears as the plaintiff, rather than the defendant. He relates this to the fact that most hire-purchasers are oblivious of their contractual rights. Lord Windlesham pointed out in the House of Lords⁽¹⁰⁾ that: "A rough and ready understanding of the law,

7. Kwesi Essien, "Consumer Protection in Nigeria: The Case For Reform", Unpublished Paper presented at the Annual Law Teachers Conference, Ahmadu Bello Univ., Zaria, 1981, p.8.

8. Furmston, M.P. "Ignorance of the Law" Legal Studies (1981), pp.37-38.

9. [1956] 2 All. E.R. 866.

10. HL 15 May 1974.

a feel for it if you like, is a mark of the democratic system itself. There is not much point having rights unless people are aware of what they are and know how to act on them."

Observations in Cameroon point to an abysmal lack of realization or imagination on the part of the Cameroonian public about what the law might do for them. This attitude is unfortunately not confined to the lay public, but extends to a certain degree to Cameroonian lawyers. How else can the fact that doctrines such as "fundamental breach" have rarely been pleaded by advocates in cases dealing with exclusion clauses in the part of Cameroon subject to the common law? The recent strides made in the North American continent and in Western Europe towards the protection of consumers has been achieved through the creation of Consumer Associations in those parts of the world. These associations have heightened the awareness of the unconscionable aspects of standardized contracts, among other things, thus forcing the courts and the legislatures, as it were, into taking cognizance of the problems that exist. The non-existence of Consumer Associations in Cameroon (and indeed in most of Africa) means that the courts can hardly be pressurized into controlling standardized contracts. This leaves the stronger parties to such contracts with a free hand to impose whatever contractual terms they please, with the knowledge that their co-contractors will rarely resort to the courts and that even if they did, the odds are against any effective censure of their standardized contract terms by the courts. Proposals for the solution of this problem will be dealt with in Section II of this chapter.

C: The Problem of 'Access to Justice'

The discussion of standardized contracts has for a long time been limited to the question of the protection of the substantive rights of the contracting parties. In recent years however, there has been a remarkable shift of emphasis and it is now realised that there are indeed two facets to the problem: the problem of protection and the problems involved in vindicating the rights to be protected. The realization that "the enforcement or procedural protection is merely another side of the content of this right,"⁽¹¹⁾ has led to the birth of the "access-to-justice movement."⁽¹²⁾

The French and English legal systems on which that of Cameroon has been patterned were designed to cater for a laissez-faire economy and are ill-suited to deal with the intractable social and economic problems eminent in Cameroon. Hence, the Cameroonian legal system which, similarly to those of its progenitors, relies heavily on skilled lawyers is too expensive for the average Cameroonian consumer, farmer or small businessman, particularly in view of the fact that the issues at stake do not normally involve considerable sums of money. The legal system in itself therefore thwarts the desire on the part of many to resort to litigation. Although there is provision for legal aid in Cameroon, it has been seen that it is severely limited in scope.⁽¹³⁾ To the extent that the disputes assigned to the courts for resolution are between disputants of inadequate or unequal

11. R. Claude, "Comparative Rights Research: Some Intersections Between Law and Social Sciences", in Comparative Human Rights, (Baltimore, 1976), p. 382 at 395.
12. See M. Cappelletti and B. Garth: "The World-wide Movement To Make Rights Effective - A General Report," in M. Cappelletti, Access To Justice, (Sijthoff, 1978), Vol. 1. Bk 1. Also, R. Nader - "Consumerism and Legal Services: The Merging of Movements" - 11 Law and Society Rev. (1976) p.242.
13. See Chapter 1.

means, the present judicial system may not provide a fair forum."⁽¹⁴⁾ This conclusion, reached with respect to a developed country, the United States of America, is even more apt in relation to Cameroon where contracting parties are economically much more disparate.

The legal system in Cameroon also functions 'a posteriori'. It requires the aggrieved contracting party to instigate proceedings against the other party. This presupposes that such a party is capable of identifying when his interests have been injured and that he has a legal remedy. This is surely beyond the ken of the average Cameroonian litigant. The first barrier to "access" is therefore educational as has first been pointed out. Although legislative palliatives can be brought to bear on this problem, it cannot be wholly solved by legislative fiat. The truth of the matter is that in Cameroon it cannot be solved except through massive societal changes which inevitably involve time and considerable financial outlay. Hence, any eventual legislation on standardized contracts must assume the existence of this problem rather than assume that it can be solved, and must seek to accommodate it.

This problem is exacerbated by the geographical difficulties in reaching the courts. In Cameroon, the courts are situated in the head towns of each administrative division. This poses considerable difficulties to would be litigants residing in the rural areas who may have to travel for distances of up to a hundred kilometres and more in order to get to the courts. Furthermore, because of the recent explosion in litigation

14. E. Johnson, "Thinking About Access, A Preliminary Typology of Possible Strategies", in Access To Justice, op. cit., note 12.

generally in Cameroon, litigants have to wait sometimes for years before obtaining judgment.⁽¹⁵⁾ This is again to the disadvantage particularly of those who are economically not well-off, residing for the most part in rural areas.

In addition to the educational, geographical and financial barriers, there is also a psychological barrier to access to justice in Cameroon. The official languages used in the Cameroonian courts are French and English, languages spoken only by the educated minority of Cameroonians. In addition to this, the procedures of the courts, with all their paraphernalia, are absolutely alien to most Cameroonian litigants. Indeed, to the peasant from the village, the court is nothing but a group of faceless bureaucrats conspiring to deny him justice; his plight not being far removed from that of Joseph K. in Kafka's "The Trial". An illustration of the sense of frustration felt by litigants from the rural areas in particular is evidenced by the case of *Doh David c/ Lamy Grey*.⁽¹⁶⁾ The plaintiff, a peasant, brought an action in the Batouri Court of First Instance (in the French speaking part of the country) against the defendant, a businessman, on a contractual matter. After judgment was given against him, he applied for leave to appeal, but his application was not granted. He thereupon wrote to the Yaounde Court of Appeal in the following terms:-

15. See Alexis Pipande Mouelle: "Communication du Cameroun - Actes de la Conférence des Ministères de la Justice des Pays de Droit d'Expression Française", September 1980, Penant, numéro spécial, p.87. An indication of this explosion is revealed by the following statistics:- In the Douala High Court, 401 cases on civil and commercial matters were decided in 1962-63. In 1971-72, barely nine years later, the same court heard more than 3494 of such disputes. This increase in the use of the courts has not however been matched by a similar increase in the personnel of the courts.

16. Affaire No. 96/72, 1972, Cour d'Appel de Yaoundé. (Unreported.)

"The Court of Batouri, having very poorly decided my case against Lamy Grey, I wanted, and still want to appeal to you. However, since I deposited my application, the Registrar has refused to register my appeal for reasons he knows best.

"Confronted with this situation, I am powerless and have only one option, that is, to get in touch with you directly, and to ask you what I should do in the face of this social injustice, which gives preference to friendship and bottles of whiskey, and takes advantage of the ignorance and old-age of complainants....".

Needless to say, the Yaounde Court of Appeal held that the above letter disclosed no grounds for appeal. The above is nevertheless illustrative of the feeling and attitude most Cameroonians have towards the courts. Although this attitude springs partly from ignorance, it is submitted however that the formalism of the procedures of the Cameroonian courts, inherited from those of their erstwhile colonial powers plays a major role in generating such attitudes. Unable to get any remedy from the courts for claims which they deem well-founded, many litigants can think of no other explanation than that court officials are corrupt and biased in favour of the rich and powerful. However groundless these feelings may be, the confidence that the public ought to have in the courts, which is fundamental if they are to effectively serve as dispute resolution institutions is consequently undermined.

The upshot of the state of affairs outlined above is that the courts in Cameroon serve the ends of the richer and stronger parties in so far as standardized contracts are concerned, rather than those of consumers,

farmers and small businessmen who need the protection of the courts more. The stronger parties appear more as plaintiffs in debt collection cases and to enforce their contracts generally. This trend is again, not peculiar to Cameroon. Galanter reached similar conclusions with respect to consumer transactions in the United State of America.⁽¹⁷⁾ The stronger parties enjoy institutional facilities which consumers and weaker contracting parties generally do not. They enjoy the use of skilled and even specialised lawyers; they have the wherewithal with which to sustain legal actions, however long they may take. Furthermore, they do so with the comfort that if they succeed, costs would be awarded to them. Indeed, because they know that there are strong disincentives against weaker parties instituting legal actions, they not infrequently resort to "self-help". This was seen in the practice of the Cameroon Development Bank whereby they give themselves the right (in their standardized contract form) of impounding their debtors' chattels without even obtaining a court order to that effect (discussed in Chapter Four).

Some writers have suggested that because of the pluralist nature of most African societies, what is required is a legal system with a pluralist nature, with a variety of courts capable of serving the different segments of the population appropriately.⁽¹⁸⁾ It is however contended that while this might be a possible solution with respect to other branches of the law (by the way such courts already exist in the form of customary courts),

17. Galanter, M., "Why the Hayes Come Out Ahead: Speculations on the Limits of Legal Change," J. of Law and Society, (1974), p.131.

18. Bush, R.A., "Traditional and Popular Forms of Dispute Processing and Their Modern Vitality" in Cappelletti and Garth, note (12), supra, at p.263.

such as land law, family law and labour law, it is inappropriate in dealing with standardized contracts which, it has been said time without number, are a spin-off of the modern economy. Whatever improvements might be brought to bear on the legal system, such as the introduction of small claims courts and class actions, such improvements will merely be palliatives, not going to the root of the problem and having only a slight impact. It is submitted that the exclusive use of the courts is itself an impediment to the effective control of standardized contracts for reasons to be discussed next.

D: Institutional Difficulties Faced by the Courts.

In the last chapter, it was seen that the trend in North America and in Western Europe has been to resort to legislation in connection with standardized contracts. Furthermore, reliance is increasingly being placed more on administrative, rather than on judicial, institutions as far as the enforcement of such legislation is concerned. The view will be put forward here that this ought to be a fortiori the case in Cameroon for reasons to be discussed later. It is worthwhile however to mention the position taken by a few of the critics of these recent developments. S.M. Waddams feels that in the Anglo-American law jurisdictions, they are the outcome of "an attitude to the judicial function that is rapidly becoming outdated".⁽¹⁹⁾ He contends that over the last twenty years, judicial attitude to law reform has changed dramatically. He cites Viscount Simmond's castigation of Lord Denning's attempt to enable a third

19. S.M. Waddams: "Legislation and Contract Law." University of Western Ontario Law Rev. Vol. 17, (1978-79), p. 185.

party to benefit from a contract to which he was not a party in *Midlands Silicones v. Scruttons Ltd.*,⁽²⁰⁾ as an "undiscerning zeal for some abstract kind of justice" and also as "well-meaning sloppiness of thought", to show how less than twenty years ago, the judiciary was loath to decide policy issues. He however went on to cite Lord Wilberforce in *Miliangos v. George Frank (Textiles) Ltd.*⁽²¹⁾ who said "It is entirely within this House's duty in the course of administering justice, to give the law a new direction in particular where, on principle and in reason, it appears right to do so. I cannot accept the suggestion that because a rule is long established, only legislation can change it - that may be so when the rule is so deeply entrenched that it has infected the whole legal system, or the choice of a new rule involves more far-reaching research than the courts can carry out."

That Professor Waddams is right in this connection is beyond any doubt. Indeed as the chapters on the judicial treatment of standardized contracts and on unconscionability indicate, common law and even civil law approaches to standardized contracts are strewn with instances where the courts have tried to reform the law. Indeed Professor Waddams' contention even appears to be rather trite.⁽²²⁾ Lord Wilberforce makes two pertinent points above.

20. [1962] A.C. House of Lords, p.446.

21. [1976] A.C. p. 443 at pp. 469-70.

22. Professor Waddams is not alone in commenting deprecatingly on the new trend in contract legislation. Prof. Reiter (see Reiter, "Unconscionability: Is there a choice? A Reply to Prof. Hasson," Vol. 4, Canadian Business Law Journal, p. 403), points out the difficulties involved in perceiving all the possible problem areas in order to legislate appropriate solutions to them in advance. See also: G. Berloiz, "Droit de la Consommation et Droit des Contrats," J.C. P. (1979), Doctrine, 2949.

First of all, he states that judicial control is unsuitable if the rule to be changed is so deeply entrenched that it affects the whole system. At the risk of belabouring the point, it must be stressed that the law of contract has an important impact on distributive justice,⁽²³⁾ particularly the law relating to standardized contracts. Should this be left to the courts? Professor Griffith has very ably pointed out that the notion that the courts are an embodiment of the shared morality of the community is "nonsense at the very top of a high ladder".⁽²⁴⁾ It is obvious (particularly in Cameroon) that the business community's interest is in the maintenance of the status quo while it is in the interests of the weaker parties to standardized contracts to have such contracts regulated. Hence any intervention to redress the balance which is in Cameroon heavily tilted in favour of the business-community, must in the final analysis be rooted in some conception of justice. In North America and Western Europe, the liberal theory of justice, advocating welfare-state capitalism, has been the main influence on the recent reforms, however inarticulately.⁽²⁵⁾ The question then is, are the courts the best institutions to make this choice of such cardinal importance? It is put forward that the choice must be left to the legislature.

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23. A.T. Kronman, "Contract Law and Distributive Justice", 89 Yale Law Review, (1980) 472-479.
 24. Griffith, "The Political Constitution" 42 Modern Law Rev. (1979) at p.11.
 25. J. Rawls. A Theory of Justice (Oxford Univ. Press, 1972), is an example of this theory. Others such as Hayek and Nozick hold otherwise, i.e. that any intervention is wrong because it required interference in peoples' lives. See: Hayek, The Constitution of Liberty. (Routledge and Kegan Paul, 1960) Nozick, Anarchy, State and Utopia. (Clarendon Press, Oxford, 1974).

This problem has an added significance in Cameroon which it has been time and again made clear, has a pluralist legal system. French law, English law and Customary law (including Islamic law) co-exist together. Side by side with this pluralist legal structure, there is a highly centralised state machinery, the guiding principle of which is the maintenance of the unity of the State.⁽²⁶⁾ This decentralised nature of the Cameroonian courts has engendered suspicions on the part of the government that the courts have not been working in the interests of the government. Hence, there has been a gradual whittling down of the influence of the judiciary, while on the other hand, the pervasiveness of the executive has been intensified. Most enactments from the legislature in Cameroon are designed for administrative rather than judicial enforcement. Indeed, this negative attitude of the government towards the judiciary is reflected in its policy towards the personnel of the courts.

While immediately after independence, the judiciary was highly elitist, attracting only the best lawyers, because of the reduced importance of the courts, and the fact that judges have been incorporated into the mainstream of the civil service, the judiciary no longer attracts the best lawyers. On the contrary, it has become the refuge of the less able lawyers.

The above points have two important consequences. First of all, the predominance of the 'administration' over the judiciary, encouraged by the government has been internalized to a large extent by the local population, particularly in the rural areas. Hence, it is not uncommon to find people in those areas resorting to agents of the administration such as District Officers (Prefects) with contractual or tortious disputes, rather than to

26. See Kontchou: "Idéologie et Institutions Politiques" in Dynamiques et Finalités des Droits Africains, Paris 1980, ed. Gérard Onac, p. 442.

the courts. The former are perceived to be more effective (access to them is easier, both geographically and financially). Secondly, because the quality of the judges, particularly of the first instance courts, is not as high as it ought to be, they have not generally proven themselves to be equal to the task of properly analysing the issues involved in standardized contracts. As the chapter on "unconscionability" shows, even highly qualified judges have not generally delivered satisfactory judgments in connection with such contracts.⁽²⁷⁾ This leads to the third major criticism of the courts in dealing with standardized contracts.

Assuming away the problems of accessibility and legitimacy, courts still do not come across as the best forum for dealing with standardized contracts. First of all, Lord Wilberforce in *Miliangos v. George Frank (Textiles) Ltd.*,⁽²⁸⁾ said the courts are unsuitable to deal with cases which involve more far reaching research than the courts can carry out. To make any proper determination on whether a standardized contract is procedurally or substantively unconscionable, considerable economic analysis needs to be carried out. In view of what has been said about the Cameroonian judiciary above, they clearly lack any fact gathering apparatus and they also lack the expertise to analyse economic facts adequately. The impact of monopoly or oligopoly power on standardized contracts has to be reckoned with. According to one commentator, the courts can at best look at the problem in terms of unequal bargaining power, a method which "will

27. See for example, the House of Lords decision in *Macaulay v. Shroeder Publishing Co., Ltd.*, [1974] 1 W.L.R. 130 and the criticisms of that decision in Chapter Three.

28. See Note (21), *supra*.

rapidly degenerate in its applications into the crassest forms of ad hocery".⁽²⁹⁾ In the United States, it has been pointed out, "fifteen years of litigation, and learned commentary have failed to produce a set of acceptable working rules for the application of the unconscionability concept".⁽³⁰⁾

It has furthermore been seen that any discussion of substantive unconscionability must be related to the determination of price. Because this requires expertise in economics and accountancy, a detailed knowledge of the sort of market within which the contract takes place, the courts are therefore manifestly ill-suited for the determination of such matters.

Another factor that imposes severe constraints on the courts in the handling of litigation arising from standardized contracts concerns the remedies open to the court to award. Leff set this problem out very aptly when he said: "One cannot think of a more expensive and frustrating course than to seek to regulate goods or 'contract quality' through repeated law suits against inventive 'wrongdoers'".⁽³¹⁾ Courts have a very limited number of remedies open to them. If a clause is found by the court to be unconscionable, more often than not, the court's only option is to have it struck from the contract without more. However, banning an offensive clause will not help buyers who assent to it.⁽³²⁾ Indeed, the fact that

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29. Trebilcock, "The Doctrine of Inequality of Bargaining Power." Post-Benthamite Economics in the House of Lords" (1976) 36 U.T.L.J. 359 at 385.
 30. Belobaba: "The Resolution of Common Law Contract Doctrinal Problems Through Legislative and Administrative Intervention" in Reiter and Swan: Studies in Contract Law. (Butterworths, Toronto, 1980) p.424 at 446.
 31. Leff: "Unconscionability and the Crowd-Consumers and the Common Law Tradition" (1970) 31 University of Pittsburg Law Rev. p. 349 at 356.
 32. Schwartz: "Seller Unequal bargaining Power and the Judicial Process" (1974) 49 Indiana L.J. 391.

there is no halfway house between banning a clause completely and letting it stand might prompt the court to choose the former option in spite of the fact that it may result in considerable unfairness to the stronger party. An instance of this situation is *Macaulay v. Shroeder Publishing Co. Ltd.* (33) The only other option open to the court would have been to uphold the disputed clause in its entirety which would have been unfair on the weaker party on the other hand.

The failure of the courts to provide more appropriate remedies stems from two premises. The first is the age-old adage that courts do not make bargains for the parties. Secondly and probably more importantly, the courts do not possess sufficient knowledge about the market context of a contract to enable them to fashion suitable remedies. Where the unconscionable aspect of a contract concerns disclosure of terms, the courts are not in a position to enforce any disclosure rules they may deem necessary.

Because the courts proceed on a case-by-case approach, their effectiveness is indeed stifled. Institutions which are primarily reactive such as courts, requiring mobilisation by citizens tend to deal with specific instances rather than general patterns, thus having little preventive capacity. (34) It is for this reason that the French legislators decided to remove consumer issues from the ambit of judicial control and to transfer it to an administrative body. Similarly, the Swedish Consumer Ombudsman, (with the Market Court) an administrative agent, is primarily responsible for consumer protection. In Cameroon, in view of the fact that only an infinitesimal number of cases on unconscionable standardized contracts do

33. [1974] 1 W.L.R. 1308.

34. Black, D.J. "The Modilization of Law", (1973) 2 J. of Legal Studies, 125.

reach the courts, the influence of the courts is therefore negligible.

Professor Dawson, writing in 1947⁽³⁵⁾ aptly summarised the problem in the following terms: "It is evident that the courts have neither the equipment nor the materials for resolving the basic conflicts of modern society or the distribution of the social product and the limits to be set to the use, or misuse, of economic power. The issues involved in these conflicts must be reserved, for the most part, for decisions by other means. The limited range of judicial action makes it no less important, however, that the issues raised in private litigation be correctly identified and placed in proper perspective." Although he went on to assume that the courts are concerned about "excessive and unjustified gains that are directly traceable to disparity in bargaining power" he nevertheless concluded that: "This assumption does not involve any expectation that the methods of private legislation will be used to overhaul the immense range of transactions involving the sale or exchange of goods and services in a competitive society. The factors that lead to judicial abstention are themselves basic; but it is time that they be examined."⁽³⁶⁾

Section II: Strategy for Reform:

Before specific proposals for law reform in connection with standardized contracts are dealt with, one preliminary point ought to be made. The criticism has all too often been made of law reform in African countries

35. Dawson, "Economic Duress - An Essay in Perspective." (1947) 45 Michigan L. Rev. 253 at 289.

36. Dawson, note (35) supra, p. 290.

that reforms have often had consequences which have been at variance with the interests of the countries concerned. Law reform, Jolowicz wrote, requires "examination of the law as it operates in society, not examination of the law's internal logic or theoretical consistency."⁽³⁷⁾ The "desirability of any law, existing or proposed, is to be judged in terms of its consequences". "It requires empirical investigation of the causal relationship between laws and their social effects, or proposed laws and their possible social effects".⁽³⁸⁾ This cannot be achieved unless a law reform commission works on the lines of a definite theory. It is this lack of a theory that characterizes the lack of consistency of purpose that is transparent in law reforms carried out by most African countries. The question then is, what theory should be adopted in Cameroon? It was argued in Chapter Two that in this connection, there has been a shift from Bentham's utilitarian theory which held sway in Western European countries in the later part of the nineteenth century to the view which prevails at the moment that weaker parties ought to be protected, i.e. a liberal theory of law reform. In Cameroon, like in most of Africa, two objectives stand out. The first is the need to achieve economic development, an objective which has been emphasized by Robert Seidman.⁽³⁹⁾ In his book, "The State, Law and Development", he convincingly shows that colonialist powers used contract law to facilitate the exploitation of the colonies.⁽⁴⁰⁾ He argues that the independent African states should use the law in the furtherance of economic development.

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37. Jolowicz, J.A. "Fact Based Classification of Law" in Jolowicz, J.A., (ed), The Division and Classification of Law, p. 3.
38. Woodman, G., "A Basis for a Theory for Law Reform", Univ. of Ghana Law Rev. 1975, p. 5.
39. Seidman, R.B., The State, Law and Development (London, 1978).
40. Seidman, supra, Chapter 5.

To this objective of economic development, should be added the concern for social (i.e. distributive) justice. It is a trite observation that economic disparities amongst individuals are greater in Africa, than in the more developed Western countries. Because contract law is particularly well suited in implementing distributive justice, being concerned as it is with regulating exchange relationships,⁽⁴¹⁾ law reformers in Cameroon should consider this as an end in view in the elaboration of any proposals on standardized contracts.

In the last chapter, the legislative approaches of four European countries to this problem was outlined. While one must necessarily be mindful of the fact that "legal transplants practically never work",⁽⁴²⁾ the methods used by these European countries provide invaluable ideas in the elaboration of similar legislation in Cameroon. Where appropriate, reference will also be made to the approaches by other African countries in this connection. In view of what has been said about the inadequacies of the courts in the first section of this chapter, one preliminary remark must be made about the approach the Cameroonian law reformers should take. Some of the foreign legislation examined above, in particular the English Unfair Contract Terms Act, 1977 and the 1976 German law on general conditions of contract assume that the courts will continue to act pretty much as they have always done. Because of the demonstrated inadequacy of the Cameroonian courts, any new legislation should necessarily be specific, detailed and well drafted, designed to be in itself a primary source of law, so as to be capable of being administered by an administrative agency.

41. See generally, Kronan, "Contract Law and Distributive Justice", 89 Yale Law Journal, (1980).

42. See Seidman R.B., note (39) supra, at p. 34.

The constitution of a law reform commission is also a matter of considerable importance. In Chapter One, the point was made that the Federal Law Reform Commissions established to prepare a Code of Civil and Commercial Obligations in 1964 was constituted oddly enough, of judges, advocates, traditional chiefs and even religious leaders, to the total exclusion of academics. It is submitted that while the above mentioned members should be part of the law reform commission, pride of place should be given to academics both in law and in other related disciplines such as economics and marketing. Only a combination of such persons can adequately examine the complex problem of unconscionability in standardized contracts.

Having disposed of these preliminary issues, it is necessary to identify the major problem areas to be dealt with. The first obviously is the problem of illiteracy and the related problem of the general lack of consciousness of the rights of the contracting parties. Secondly, certain types of contracts must be given special treatment in view of the special problems they pose. These are credit and hire-purchase contracts and also contracts for the sale of agricultural produce. These contracts do not only pose particular problems, but they are of fundamental importance because they have a considerable impact on economic development. With regard to the rest of standardized contracts, the problem of procedural unconscionability should be dealt with separately from that of substantive unconscionability. Finally, the very important problem of enforcement will be looked at.

A: The Problem of Illiteracy and Awareness of Contractual Rights:

There are essentially two problems involved where an illiterate person is a party to a contract. First of all, if it is a written contract (as standardized contracts often are), the contract may contain terms, such as exclusion, limitation or penalty clauses, which the illiterate party is ignorant about. Secondly, the validity of certain contracts (as stipulated by S.4 of the Statute of Frauds 1677) may depend upon whether they are written or not. In the French-speaking part of Cameroon, the problem was not addressed before independence. Because French law was applicable only to the educated minority - those who were given the status of "citizen"; the problem was not acute. On accession to independence, the dual status of "citizen" and "indigene" was abolished, and French law was applicable to all persons, depending of course on the nature of the transaction. In spite of the seriousness of this problem in Africa, few countries have attempted to deal with it. Nigeria has an Illiterates Protection Act,⁽⁴³⁾ the pith and marrow of which is section 3 which provides:- "Any person who shall write any letter or document at the request, on behalf, or in the name of any illiterate person shall also write on such letter or other document his own name as the writer thereof and his address; and his so doing shall be equivalent to a statement - (a) that he was instructed to write such letter or document by the person for whom it purports to have been written and that the letter or document fully and correctly represents his instructions; and (b) if the letter purports to be signed with the

43. The different Nigerian states have different Illiterate Protection Laws, although they provide substantially the same provisions: Illiterates Protection Act (Lagos), cap. 83; Illiterates Protection Law (former E.R.), cap 64; Illiterates Protection Law (former N.R.), cap. 51 ; Illiterates Protection Law (former W.R.), cap 47.

signature or mark of the illiterate person, that prior to its being so signed it was read over and explained to the illiterate person, and that the signature or mark was made by such person."⁽⁴⁴⁾

With regard to standardized contracts, it is obvious that this provision is very limited. It does not cover unsigned standardized contracts although as pointed out in Chapter Four, the Nigerian Courts have given some protection to illiterate parties where exclusion clauses have not been explained to them. However, the courts have faced considerable uncertainties, particularly with respect to the definition of an illiterate.⁽⁴⁵⁾ In Cameroon, because there are two official languages, this is certainly a problem. A contracting party may be literate in English, and not in French. That was the case in *Olabi Faye v. Cie. Industrielle d'Automobile du Cameroun*.⁽⁴⁶⁾ There is certainly a case for enabling such a party to benefit from legislation designed to protect illiterates. Alternatively, there must be a provision requiring all standardized contract forms to couch all important contract terms in both French and English.

Although the interest in protecting illiterates is very strong, it must nevertheless be balanced with other equally important interests, such as the maintenance of certainty in commercial transactions. One commentator^(46b) on this problem holds the view that there should be a "presumption of equitable fraud" on the literate parties "to written contracts." This presumption would be rebuttable by evidence showing that the literate party explained the terms of the contract to the illiterate party ...". While

44. Illiterates Protection Law (former E.R.) cap. 64, S.3.

45. Nwogugu, E.I. "An Examination of the Position of Illiterates in Nigerian Law" Vol. 12, *Journal of African Law* (1968-69), p. 33.

46. Suit No. HCSW/4/73, High Court, Buea (unreported).

46b. S.K. Date-Bah "Illiterate Parties and Written Contracts", 3 *Review of Ghana Law* (1971), p. 181

one might understand the motive for holding such a view, it is suggested that it is too strong. It is suggested that there must be a legislative duty, based on public policy on literate parties to explain the terms of the contract to the illiterate party. Moreover, this duty shall be limited to important contracts only. It is common knowledge that most people (including illiterates) are conversant enough with day-to-day transactions, particularly when subject matters of such contracts are relatively unimportant. However, the case is different in more complex transactions such as the sale of motor-vehicles, particularly when these involve hire-purchase or credit-sales terms, or credit contracts. It is with respect to such contracts (the above examples are by no means exhaustive) that there must be a duty to explain the contractual terms to an illiterate person. In this connection, there must also be a presumption that the dominant party to the contract, who proffers written contract terms has knowledge of the meaning and scope of the terms he proffers. This will prevent such dominant parties from pleading their own illiteracy if they happen to be illiterates as is often the case. The legislative provisions should also incorporate the requirement on all writers of documents to explain the documents to the illiterate persons for whom they write, i.e. a provision similar to the above Nigerian provision. Failure to comply with the above should render the contract voidable.

Turning now to the question of awareness of rights, it is obvious that this problem is even more difficult to legislate for because it hinges on the problem of the education of the public, an issue which cannot be dealt with solely by legislation. The idea put forward by Professor Furmston,

of introducing legal education to all segments of the society, particularly to schools,⁽⁴⁷⁾ is too much to hope for in the Cameroonian context for the simple reason that the material and human resources necessary to carry out such education is absent. There is, however, a case (also put forward by Professor Furmston) for using the media: radio and dailies, in imbuing the public at large with their contractual rights, whether as consumers or as farmers and small businessmen. This solution has also been put forward in connection with consumer protection in Nigeria.⁽⁴⁸⁾

A second and even more effective remedy lies in the creation of institutions on the lines of consumer associations, whose task it will be of informing and advising the public on their contractual rights, as far as standardized contracts are concerned. While such institutions can function properly in urban areas, they will not be feasible in rural areas where communities are small and dispersed. In those areas, co-operatives which already exist for the marketing of cash crops could be used as centres for the dissemination of such information. With respect to farmers, particular emphasis must be placed on informing them on the sort of terms they should expect in contracts for the sale of agricultural produce.

B: Legislation Appropriate to Special Contracts:

(i) Credit Contracts:-

It is certainly not possible in a thesis of this nature to delve into the details of credit and hire-purchase. Attention will be paid

47. Furmston, M.P., "Ignorance of the Law" Legal Studies, (1981), p.49.

48. See Kwessi Esseï, Note (7), supra, at p. 21.

essentially to the unconscionable aspects of these contracts, already examined in Chapter Four. Credit, it has been pointed out, is of fundamental importance in economic development.⁽⁴⁹⁾ The legislature must therefore ensure that credit contracts are fair to the weaker parties. Although the bulk of credit comes from banking institutions, an important part of it is provided by money-lenders. The contracts of the latter, often very shady, must be regulated. The first step in this direction would be to require them to be written, specifying the interest charged on other terms. The problem with such contracts (from my observations in Cameroon), is that because these contracts are more often than not illegal, both parties always contrive to avoid the courts. It is debatable whether by de-criminalising such contracts, the contracting parties will more readily bring them to light.

With regard to contracts by banking institutions, three particular types of clauses were seen to be unconscionable. The first, used by the Cameroon Development Bank relates to the distraint of debtors. By giving themselves a contractual right to impound the debtors goods without resorting to the courts, the banks could easily hold their debtors to ransom. Such a term is liable to abuse by the banks and it must not be allowed to stand in any credit contract.

Secondly, most banks, as a few of the cases in Chapter Four revealed, have exceedingly stringent guarantee clauses, often in effect assimilating the surety to a co-debtor, holding him primarily responsible for the repayment of the debt.⁽⁵⁰⁾ In the words of a Fonader official, "habituellement,

49. See generally, Rogers M. and Allott, A.N. "Introduction and Report of Proceedings: International Conference on Banking Law and Development in Africa" J.A.L. (1975).

50. See for example, Affaire Eboumbou Moudom, Trib. de Gde. Instance, Younde (198) unreported.

les clients trouvent nos garanties excessives."⁽⁵¹⁾ This makes many Cameroonians wary of standing as sureties to credit contracts, making it exceedingly difficult for the less well-off to obtain credit (particularly farmers and small businessmen). Guarantee clauses should be reasonable, holding the surety only secondarily liable for the repayment of the debt. In order to deter banks from using unconscionable practices as was the case in *Albert Ngafor v. Cameroon Bank Ltd.*,⁽⁵²⁾ where the bank wittingly detained the plaintiff's deed long after he had repaid his loan; or as in the case of *Mofor Alexander v. Cameroon Bank Ltd. & Others*,⁽⁵³⁾ where the bank blocked the plaintiff's account even after the loan for which he stood as surety had been repaid, provision should be made for the payment of punitive damages by the culprits of such practices.

Finally, the contractual term, provided by the standard contract forms of most banks, giving them the right to withdraw from a credit contract⁽⁵⁴⁾ is unconscionable inasmuch as it often puts the other party in a quandary and should not be allowed to stand.

Because credit contracts are very important, there must be procedural guarantees to ensure that the borrowers clearly understand the implications of the terms of the contract. In this connection a rule, on the lines of articles 6 and 7 of the French law No. 78-22 of January 10th 1978 may be adopted.⁽⁵⁵⁾ It may be recalled that those articles provide that a person

51. Ze' Ondoua, J.B. "System de Garantie du Crédit du Fonader (unpublished paper), Yaounde' 1981.

52. Suit No. HCB/3/79 of January 16, 1981, Bamenda High Court (unreported).

53. Suit No. HCB/15/80, April 22, 1981, High Court, Bamenda (unreported).

54. *Affaire Pharmacie Nnam c/ BICIC*, Jugement No. 33 du 10 Septembre 1974, Yaounde' (unreported).

55. See Note (9), of Chapter 5, Section II.

requiring a loan must make a preliminary offer (in a prescribed form). The offer remains open for fifteen days; and also that even after acceptance by the lending institution, the borrower benefits from a seven-day cooling off period, during which he may withdraw his offer. Until the expiry of that period, neither party to the contract can enforce it. This provision would benefit such parties who would otherwise hastily enter into credit contracts only to regret afterwards.

Finally, there should be provision to limit the penalty payable by the borrower in the event of a breach, for instance, in the non-payment of the loan. It may be recalled that Fonader exacts fifteen per cent of the total sum lent. It is submitted that this is an exorbitant penalty. Article 2 of the French decree No. 78-373 of 17th March, 1978 limits it to eight per-cent of the unpaid loan. This is certainly more reasonable. Although there is definitely a strong interest in ensuring that loans are repaid, this should not be by holding the borrower 'in terrorem'.

(11) Hire-Purchase Contracts

Provisions applying to hire-purchase contracts should also apply to all other types of credit sales. The principal unconscionable aspect here as the Cameroonian cases show turns on the practice of 'snatch-backs'. The absence of any legislation dealing with this practice means that the hirer can seize the good subject to the hire-purchase contract (in most cases, the good is a motor vehicle), irrespective of the amount of the contract price that remains due.⁽⁵⁶⁾

56. See for example, Mbah Mathias v. Joseph Tata, note 31, Chapter Four.

Many African countries have already enacted legislation to deal with this situation and their examples are worth looking at. The 1965 Nigerian Hire-Purchase Act, which came into force in October 1968 applies to all hire-purchase and credit sale transactions involving goods whose total price does not exceed ₦ 2,000 and also to all hire-purchase contracts involving motor vehicles regardless of their price.⁽⁵⁷⁾ Section 9 of the Act provides that where in the case of motor vehicles, the hirer has paid up to three-fifths of the hire purchase price, or one half of the price in the case of other chattels, the seller can only dispossess the hirer of the goods under a judgement of a court. Section 15 of the Kenyan Hire-Purchase Act also provides that where the hirer has paid two-thirds of the hire-purchase price, the owner can only recover the goods subject to the contract by court order. Margaret Rogers points out that two-thirds of the hire-purchase price will in most cases approximate to the full market value of the goods, allowing for depreciation.⁽⁵⁸⁾ There is therefore a case for providing that the amount above which the hirer cannot automatically seize the goods should be reduced in Cameroon to one-third of the total hire-purchase price. Although this might not please owners, it is unlikely that they will refuse to deal on hire-purchase terms because most of their sales (especially with regard to the sale of motor vehicles and other expensive goods) are carried out by the use of hire-purchase contracts. A refusal to deal on hire-purchase terms

57. Section 1.

58. Rogers, M., "A Note on Hire-Purchase and Chattels Mortgage in Kenya", Vol. 19, J.A.L. (1975), p. 154 at 157.

would mean a drastic reduction of their sales which they would certainly not welcome.

Andrew Hicks⁽⁵⁹⁾ pointed out that in Nigeria, in order to circumvent the provision against automatic seizure, many motor vehicle dealers have used hire agreements instead of hire-purchase or credit sales agreements. There is therefore a great deal of weight to his proposal that statutory standard contract forms should be used by sellers in order to forestall the possibility of circumventing the legislative provisions. Again, as with credit contracts, there should be provision to deal with procedural unconscionability. In particular, the hire-purchase contract must contain terms clearly stipulating the interest payable, the net price of the goods, and the total hire-purchase price payable on the goods. A similar provision is enshrined in article 5 of the *Swedish Consumer Credit Act, 1977*. The provision of a cooling-off period similar to that suggested in respect of credit contracts should also be considered, particularly when the hire-purchase or credit sale contract involves a considerable sum. In addition to these, provisions applicable generally to sale of goods contracts generally (to be discussed later) shall also be applicable to contracts of hire-purchase.

(111) Contracts for the sale of agricultural products

The point has been made that ignorant farmers are often subject to unconscionable contracts by unscrupulous licensed buying agents. There is a case in this connection for providing that such contracts must be in written form, stipulating clearly the prices to be paid for different

59. Hicks, A., "A Review of Some Aspects of Nigerian Law of Consumer Credit" (1975) 19 N.L.J. 41.

grades of the produce; the method of grading the produce; and also the methods of weighing. Practices such as that of Pamol (Cameroun), S.A., consisting in reducing the weight of produce for whatever reason⁽⁶⁰⁾ should not only be declared not binding on the farmers, but should also be declared illegal. Indeed, in view of the fundamental importance of these contracts on the livelihood of the bulk of Cameroonians, there are strong reasons in favour of holding parties breaching such rules criminally responsible. Although making these contracts formal might be thought to be otiose in view of the fact that most farmers are illiterate, this would however convey to the farmers the importance of these contracts, thereby making them more alert to any overreaching by the buyer of the produce.

It is however conceded that with regard to these contracts, what is required above anything else is an effective enforcement procedure to ensure that persons carrying out unconscionable practices are duly apprehended.

C: Legislation on Standardized Contracts Generally

Provisions under this heading deal with a wide gamut of standardized contracts such as contracts for the carriage of goods, the supply of water and electricity, service contracts, and sale of goods contracts.

60. See Chapter Four, sub-section C.

(i) Procedural Unconscionability: The important aspect here turns on the question of non-disclosure or inadequate disclosure of contractual terms, in particular, exclusion clauses.

In *Brasseries du Cameroun v. Mokake Elali*,⁽⁶¹⁾ it was seen that the stronger party to the contract, the appellant brewers, wilfully eschewed delineating clearly the terms on which they were contracting. That enabled them to unilaterally terminate their agreement with the respondent without incurring any liability. There is therefore a great deal to be said in favour of reinforcing the importance of "form", particularly in important contracts (this should apply where the contract involves a sum which is above fifty thousand CFA francs (approximately one hundred pounds). Such standardized contracts must be in writing, spelling out their precise terms, and should be couched in ordinary language, rather than in arcane legal language.

There should be a general duty to disclose all relevant information involved in a contract, especially exclusion terms, and the onus should be on the person relying on the contract (the dominant party to the contract) to prove that he had done all that was necessary in disclosing the contract terms. This is a feature of the legislation of the four European countries looked at in the last chapter.

The provision enshrined in Section 17(2) of the British Fair Trading Act proscribing any practice likely to mislead consumers is also interesting in this regard. A similar provision is laid down in the 1975 revised version of the *Swedish Market Practices Act, 1970*,

61. Civ. Appeal No CASWP/14/79, 1980. Court of Appeal, Buca (unreported).

(article 2). This refers generally to advertisements and publicity given prior to the conclusion of the contract. Such publicity should be held to form an integral part of the contract. This measure is designed to protect the naive and gullible in particular who are often induced into entering into contracts by flamboyant statements made by astute salesmen determined to press their goods or services on them. This is of particular importance in contracts for the sale of used cars where unknowledgeable buyers are led by salesmen into buying worthless cars.

Important terms, such as exclusion clauses, which are not adequately brought to the notice of purchasers of goods or services should not be incorporated into the contract. Standardized contract forms must also spell out the nature of guarantees given (in the case of sale of goods), the mode of payment, the party responsible for servicing commitments, etc.

Finally, where the other contracting party is a consumer, or a weaker contracting party in comparison with the party putting forward the contract terms, the consumer or weaker party should benefit from a cooling-off period. This provision should however be limited to important contracts such as the sale of motor vehicles or other expensive items. This provision has very many inconveniences which make it unsuitable to be applicable to some contracts. Not only is it time wasting, but it may prove to be difficult to apply in certain contracts; for example, in service contracts, where the service has already been supplied. Even in contracts for the sale of goods, there

might be problems where the goods have already been used. Should the supplier of a service or the seller be compensated? If so, then the effect of the cooling-off period will be considerably diminished. If, on the other hand, no compensation is provided for, then one party will be unjustly enriched. However, difficult these problems may be, they are not intractable. Nevertheless, this provision should be limited to important contracts only.

It is noteworthy that this provision is enshrined in Article 1583 (3), rule 4 of the *Civil Code of the Seychelles*. The rule provides that where a sale is in standard form "the contract shall only have binding effect 48 hours after the document has been signed by the buyer. Until that time has elapsed the buyer is entitled to avoid the contract".⁽⁶²⁾ It is submitted however that in the case of Cameroon, this period should be extended to a minimum of four days, considering the difficulties in communication that exist in that country. The above provisions, designed to protect weaker parties from procedural unconscionability in standardized contracts can be couched in a limited number of provisions, thus avoiding a surfeit of legislative proposals.

(11) Substantive Unconscionability

In the chapter analysing the problem of unconscionability in contracts, the conclusion was reached that this problem is much more complex than it is commonly thought to be, consisting as it were, not only of the problem of unconscionable contract terms, but also of unconscionable prices. Certain African legal scholars have also

62. See Chloros, A.G. Codification in a Mixed Jurisdiction (North Holland P-b. Co. 1977).

begun to look at the problem from this perspective. Hence here, an attempt will be made to provide for the problem of unfair contract terms and also to look at price control legislation.

In controlling unfair contract terms, blanket provisions prohibiting unfair contract clauses, a method used in the English Unfair Contract Terms Act, 1977, are not appropriate in Cameroon, because they assume that they will be principally enforced by the courts. This approach has been used by the Papua New Guinea legislature. Section 7(1) of the *Fairness of Transactions Act of Papua New Guinea* permits a court to re-open any contract which is not genuinely mutual or which is otherwise unfair to one of the parties.⁽⁶³⁾ Similarly, Article 1118 of the Civil and Commercial Code of the Seychelles provides: "If a contract reveals that the promise of one party is, in fact, out of all proportion to the promise of the other, the party who has a grievance may demand its rescission; provided that the circumstances reveal that some unfair advantage has been taken by one of the contracting parties. The loss to the party entitled to the action for lesion shall only be taken into account if it continues when the action is brought." The usefulness of such provision resides in the fact that it sets out a policy which enforcement institutions will have to abide by. It is however too general to be capable of being administered by an administrative agency.

63. See Sprivastava: "The Law Reform Commission: Farmers of Transactions Bill", Vol. 15, *The Malasian Law Journal* (1977), p. 139.

In the Cameroonian context, it seems preferable therefore to adopt a combination of the German and French approaches to the problem. Under Section 10 and 11 of the German law on Standard Contract Terms (1976) the use of specific clauses is prohibited. Clauses appearing under S.10 of that law are not unconscionable 'per se' but their validity must be determined within the context of the whole contract. Penalty and forfeiture clauses fall under that section. Clauses under Section 11 are however unconscionable 'per se' and are absolutely proscribed. In Cameroon, clauses excluding liability for personal injury should fall under such a provision. Also should be prohibited, clauses giving one party the right to modify the contract price unilaterally. Exclusion and limitation clauses should be valid, only if they are not unconscionable. Any clause which purports to exclude all warranties and guarantees in sale of goods, should be prohibited. This shall apply even to the sale of used cars.

In addition to the proscription of harsh clauses, there must be a provision requiring clauses defining the rights of buyers. Such clauses should include the warranties and guarantees given in sale of goods contracts; clauses indicating time-limits for performance in service contracts in particular, clauses specifying maximum interest rates payable in credit and hire-purchase contracts. Specific ceilings for liquidated damages should also be imposed. Needless to say, the above provisions are by no means exclusive. Furthermore the French provision requiring an administrative body to review from time to time new standardized contract terms, and to prohibit these which fall foul of the accepted standards of fairness should be considered.

Price Control Legislation

Price control legislation in Cameroon provides an illustration of the desire to control unconscionability in contracts. This is all the more necessary because, as pointed out earlier, the short supply of most goods and services puts the suppliers in a very strong position, vis-à-vis consumers in particular, a position which they are wont to exploit to their advantage.

The existence of just a few firms in certain markets [for example, in the motor-vehicle business, SCOA and SHO (Africauto) dominate the market]. The Cameroonian legislature, like those of other African countries has therefore, from very early years, sought to control predatory pricing, especially as it can have detrimental effects on the economy.

Price control began in Cameroon, with the Law No. 63/LF/27, of the 19th of June 1963,⁽⁶⁴⁾ which established a regime of price control. In 1968, the then Federal Assembly passed a law (Law No. 68/LF/22 of November 18th 1968), delegating to the Federal Government the right to pass legislation on prices. The details of the numerous enactments will not be delved into as their analysis would involve points which are too technical to be capable of being dealt with here. This section will confine itself to those aspects of the enactments that affect standardized contracts.

64. This law, and other laws and regulations in this connection are found in: Handy V.E and Noubeyon E. "Nouveau Recueil des Importants textes sur la Regle'mention des Prix, des Poids et mesures". (Yaounde, 1980).

On a procedural level, an important Ministerial Order was passed in August 1971 (Arêté No. 782/MINFI/DCE/P) dealing with the publicity of prices in all consumer contracts. Article 1 of the Order provides that any advertisement of consumer goods or services must mention the total price a consumer will effectively have to pay. Article 2 states that any publicity making mention of a reduction of the price of a good or service must state in percentage terms the value of such reduction. Article 5 provides similar requirements with respect to bargain sales, clearance sales and auction sales. Article 21 of a 1964 Ministerial Order on price control requires hotel and restaurant keepers, entrepreneurs of transport services and suppliers of other services to display their rates and charges in places open to the general public. Various articles in Law No. 79/11 of June 30th 1979 also contain guarantees against procedural unconscionability. Article 43 prohibits any actions, isolated or concerted, by individuals or firms, designed to restrict the supply of goods or services, or to increase their prices. Section II of the law provides that all sales must be evidenced by a receipt, indicating the price at which the goods or services are sold. Section IV of the same law deals with hire-purchase and credit sale transactions. Article 46 provides that in such sales, the seller must deliver to the buyer, a signed copy of the terms of the sale. A duplicate copy of such terms must also be kept by the seller for at least three years after the conclusion of the contract.

These provisions are indeed important and they go a long way towards meeting some of the proposals put forward in the last section. They are not nearly enough however. They should be extended

to take account of the proposals relating to disclosure already put forward.

The substantive provisions on price control in Cameroon consist essentially in placing goods under three different categories, and in attributing to each category a particular method of determining prices. These categories are (a) essential goods (such as foodstuffs and other necessities), (b) heavy and bulky goods (building materials for example), and (c) luxury goods (jewelry for instance). Different profit margins are allowed to the sellers of these goods. The base-line for the determination of the profit margins is the gross cost of the goods in question; in the case of imported goods, their cost, insurance, freight and other warehouse and transport charges, and in the case of home-product goods, the manufacturers' or producers' prices. Furthermore different profit margins apply depending on whether the seller is a wholesaler or retailer.⁽⁶⁵⁾

In addition to these general provisions, specific legislation has been enacted to deal with particular businesses. Ministerial Order No. 14/MINEP/DPPM, of March 4th 1977 regulates the sales of pharmaceutical products. Another Order, No. 006/MINDIC/DC/82 deals with activities related to the automobile industry. Article 4 of this order provides that the maximum charge per hour for the repair of vehicles is one thousand CFA francs, i.e. about £2 per hour.

65. Details are spelt out in Decree No 69/DF/409 of October 2nd 1969.

Another order passed in 1971, Order No. 96/MINFI/DCE/P2 deals with the sales of spare parts for vehicles.

Law No. 79/11 of 30th June 1979 deals with the sanctions applicable to any party who is in breach of the above provisions. There are two types of sanctions provided for: judicial and administrative. Any infringement of the provisions designed to deal with procedural unfairness is punishable by a fine of between 5,000 and 50,000 CFA-francs (i.e. between approximately £10 and £100). Besides, any person breaching those provisions may be criminally liable and may be given a prison sentence of between five and fifteen days. In the case of a breach of any of the substantive provisions, a fine of at least 10,000 CFA francs is levied (approximately £20). In the case of persistent offenders, the fine is doubled and they may face a prison sentence of up to two years. The court also has powers to close the defaulting party's business premises.

There are also administrative sanctions which, more often than not, are the applicable sanctions. Where an enforcement officer establishes that a party is in breach of the above provisions, he fills in a report (in standard form) to this effect, which the defaulter signs, and exacts a compromise fine. The fine varies with the amount of the price illicitly charged. In the case of a persistent offender, the enforcement authority may close the offender's business for three months (renewable once) even without recourse to the courts. This appears to be rather drastic from the point of view of sellers

and naturally enough it has led to considerable litigation.⁽⁶⁶⁾

The enforcement of the price control legislation is dealt with by agents of the Price Control Department (attached to the Ministry of Economy and Planning), who must take an oath in the Court of First Instance before exercising their duties. The price controllers are for the most part graduates from the Faculty of Law and Economics of the University of Yaounde. They act either on their own initiative or on complaints by consumers.

The enforcement of price control legislation has been quite effective, particularly in the urban areas. In one city alone, Yaounde, over 450 million CFA francs were paid in as fines in 1980. The highest fine paid by a single firm on a given occasion was 1,101,000 CFA francs.⁽⁶⁷⁾ More importantly, the vigorous administrative enforcement has succeeded in instilling an awareness among the business community and consumers that the state machinery will protect the latter against predatory pricing, something the courts could never achieve.

The major lacuna of the legislation is that it does not in any way provide for compensation to those who have paid unconscionable prices for goods or services. Be that as it may, it is contended that it is a step in the right direction. All that is required is for it to be incorporated in more comprehensive legislation, dealing with the wide ambit of unconscionable terms, practices and prices outlined in this chapter.

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66. In Tengo Stanislas v. The Provincial Chief of Service, Price Control, Bamenda, Suit No. HCB/37/M, 1979, Bamenda High Court; the High Court refused to quash an order taken by a price control officer to close a shop.
67. Interview with Mr. Nsom Eba, Price Control Department, Yaounde, July 24th 1981.

D. Enforcement

It is trite to remark that however well conceived and drafted legislation may be, its impact ultimately hinges on the effectiveness of its enforcement. This is particularly so with regard to the strategy outlined above. It has been exhaustively argued that because of the complexity of the issues involved, and also because of the intractable problems of access to courts, the latter are not suitable for the enforcement of the above proposals. This point of view is increasingly gaining ground even in the developed countries. It has been seen that France and Sweden have moved in this direction. Although it is not proposed that the jurisdiction of the courts should be entirely ousted in this connection, it is submitted however that they should be relegated to the second place, while primary responsibility for enforcement should be attributed to an administrative agency.

The infrastructure of such an agency already exists in the Department of Price Control, attached to the Ministry of Economy and Planning. This Department is already very decentralized, with offices in each head town of all the administrative decisions in the country. Its personnel are well trained and quite effective in price control already. They have been dealing with businessmen, farmers and consumers for the past twenty years which has given them invaluable experience which has never been acquired by court officials. Because of the legal training most of them have acquired they are very conversant with contractual documents. The control of standardized contract terms will simply be added to their task of controlling prices.

The procedure laid down in Ordinance No. 72/18 of 17th October 1972, should also govern the enforcement of the proposed legislation. It empowers the controlling agents to call on all types of businesses and to demand any relevant information. Individuals may also lay their complaints to the agents who must act on such complaints. All that is required is a reinforcement of the existing enforcement machinery which already has a wealth of knowledge in this connection and also a sound fact-finding machinery.

Another important institution which could be copied in Cameroon is that of the Consumer Ombudsman, an office created by the Swedish Market Court Act, 1970. Date-Bah has also suggested that such an office should be created in Ghana in connection with the control of unconscionable contracts.⁽⁶⁸⁾ There has been a lot of controversy whether the office of an ombudsman is desirable in most African states. It is contended that because most of them are one-party states (as indeed Cameroon is), the Ombudsman will simply be a servant of that party, thereby reducing his effectiveness.⁽⁶⁹⁾ It is not however necessary to go into the merits of this claim in as much as the nature and functions of the type of Ombudsman being proposed are different from those whose function is to act as an administrative watch-dog, the "grievance man", checking the high-handedness of bureaucratic institutions.⁽⁷⁰⁾

68. Date-Bah, S.K. "Legislative Control of Freedom of Contract" Damets and Woodman, (eds.) Essays in Ghanaian Law, (Fac. of Law, University of Ghana, 1976) p. 131.
69. Prof. Mittlebeeler, E.V. Correspondence - "The Ombudsman in Africa", 9 J.A.L. (1965) p. 134.
70. Hill, L.B. The Model Ombudsman (Princeton Univ. Press, 1976)p.3.

It may be recalled that the Swedish Consumer Ombudsman's duty is essentially to receive and investigate complaints with respect to breaches of the Swedish Contract Terms Act. He does not necessarily come into conflict with the government except in so far as the business concerned is state owned. His functions are therefore far removed from those of the Parliamentary Ombudsman, the J.O. It is with respect to the latter institution that the debate about whether an Ombudsman can function effectively in Africa has taken place. To be sure, a Consumer Ombudsman in Cameroon would inevitably have to take on state owned corporations, for example, the state owned National Railway Company or the Electricity Board. However, because he deals with purely technical matters, i.e. the protection of users of services these companies provide, rather than with issues which are overtly political, it is hoped that the fact that he is appointed by the government would not seriously affect his effectiveness.

The Consumer Ombudsman should oversee the application of legislation designed to protect weaker parties to standardized contracts, and also to propose amendments to such legislation whenever desirable. As in Sweden, he should be given powers to issue injunctions against businessmen who use contract terms which are prohibited by legislation.

Another of his functions should be to co-ordinate programmes designed to educate the public, particularly those in rural areas, about their contractual rights.

This institution does not yet exist in any African state. The Tanzanian Permanent Commission of Enquiry for example is akin to the Swedish J.O., rather than the Consumer Ombudsman. It is therefore an office which could be instituted in other African countries. Both types of Ombudsmen however are necessary because traditional forms of control against unconscionable practices of government and the business community have failed.

Finally, the consumer could act as an advocate for weaker parties requiring specific redress from the courts. This function should however be strictly limited to only very deserving cases (preferably where the plaintiffs are peasants, too poor and ignorant to hold their own in any event).

Because the thrust of the legislative proposals given above is to protect weaker parties, rather than to compensate them, the courts should continue to adjudicate on cases stemming from standardized contracts where specific redress is sought. Hence, there is still room for enforcement of the proposed legislation by the courts.

Conclusion

It is hoped that this thesis has shown how much out of touch the law of contracts as practised in Cameroon is with economic and social conditions that prevail in the country. Given the importance of the law of contracts, both as an instrument for the realization of social justice and also as an instrument for the furtherance of economic development, this fact ought to generate serious concern and attempts must be made to correct this situation.

The failure of the Cameroonian courts must be acknowledged in order that alternative dispute resolution institutions be created. In this failure, the courts of the French law and the common law traditions stand on the same footing. As was seen in Chapter Four, the fact that they follow different approaches to standardized contracts has not however resulted in substantially different results.

This thesis has attempted to explain that failure. Since continuous deference to English and French law concepts has not brought about the desirable changes in this area of the law (the same can be said of many other areas), the time has therefore come for Cameroonian law reformers to undertake a lot of fresh thinking in connection with standardized contracts. In this respect, proposals which may guide the Cameroonian law reformers have been stated here. These proposals have been drawn from the current analysis of the notion of "unconscionability" and also from modern pieces of legislation dealing with standardized contracts by other countries, bearing in mind always, the particular circumstances of Cameroon.

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List of Abbreviations

Bull. civ.	Bulletin Civil
Cass. civ.	Cassation chambre civil
Cass. com.	Cassation chambre commercial
Ch./Chron.	Chronique
C. civ.	Code civil
C.L.J.	Cambridge Law Journal
C.U.P.	Cambridge University Press
D.	Dalloz
D.P.	Dalloz périodique
D.S.	Dalloz social
ed.	édition
et.s.	et suivant(es)
Gaz. Pal.	Gazette du Palais
J.C.P./Sem. Jur.	Semaine juridique (Jurisclasseur periodique)
J.O.	Journal officiel
L.G.D.J.	Librairie générale de droit et de jurisprudence
L.Q.R.	Law Quarterly Review
M.L.R.	Modern Law Review
N./no.	numero
P.U.F.	Presse universitaires de France
Rev. trim. dt. civ.	Révue trimestrielle de droit civil
Rev. trim. dt. com.	Révue trimestrielle de droit commercial
S.A.	Société Anonyme
Somm.	Sommaires.